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# In the Supreme Court of the United States

OCTOBER TERM, 1981

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA, and H. B. ALVORD, COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,

*Petitioners,*

v.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,

*Respondents.*

## On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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## QUESTIONS PRESENTED

1. Whether an action against the taxing officials of two states to adjudicate their mutually inconsistent domicile-based death tax claims involves a "controvers[y] between two . . . States" within this Court's exclusive jurisdiction under 28 U.S.C. § 1251(a) and is thus outside the jurisdiction of a federal district court.

2. Whether the Federal Interpleader Act provides a basis for district court jurisdiction to resolve this controversy between two states concerning their conflicting domicile-based inheritance tax claims, even though neither state nor its taxing officials are "citizens of a state" for purposes of diversity and interpleader jurisdiction.

3. Whether an interpleader stakeholder with an interest in the fund at issue is a "claimant" within the meaning of the Federal Interpleader Act, so as to establish federal jurisdiction with a $500 jurisdictional minimum (and nationwide service of process) in cases where only one defendant-claimant is a citizen of a diverse state.

4. Whether this action, which does not involve a substantial claim that state officials are acting illegally and/or unconstitutionally, is barred by the Eleventh Amendment.*

5. Whether a change in California law which requires the dismissal of one of the two "claimants" whose presence was the original basis for jurisdiction deprived the district court of jurisdiction over this action.

6. Whether, in a controversy between two states over their conflicting domicile-based inheritance tax claims, venue should be transferred from a court sitting in one of those contending states so that the action may be heard in a forum whose residents have no personal interest in the cause of one of the claimant states.

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*While this question was not presented in the Petition for Certiorari, it is jurisdictional (*Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974)), and may therefore be considered by the Court. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277 (1980); *see* Stern and Gressman, SUPREME COURT PRACTICE 459 (5th Ed. 1978.)

## PARTIES

There are two Petitioners, each appearing in his official capacity: Kenneth Cory, the Controller of the State of California, and H. B. Alvord, the County Treasurer of the County of Los Angeles. Respondents include Mark White, the Attorney General of the State of Texas; Bob Bullock, the Comptroller of the State of Texas; William Rice Lummis, as Texas Administrator of the Estate of Howard R. Hughes, Jr. (the Estate), as Nevada Co-Special Administrator of the Estate, as Louisiana Provisional Administrator of the Estate, and as Delaware Ancillary Administrator of the Estate; Richard Gano, the California General Administrator of the Estate; the First National Bank of Nevada, the Nevada Co-Special Administrator of the Estate; and the United States of America.

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## OPINIONS BELOW

The Court of Appeals opinion is reported at 629 F.2d 397 (5th Cir. 1980) and is reprinted as Appendix "A" in the Appendix to Petition for Writ of Certiorari (hereafter "Pet. App.") previously filed. The order denying a petition for rehearing is noted at 634 F.2d 630 (5th Cir. 1980), and is reprinted as Pet. App. "B". The order denying Petitioners' Motion for Leave to File Petition for Rehearing Out of Time is unreported and appears as Pet. App. "C".

The opinion of the District Court is reported at 491 F. Supp. 5 (W.D. Tex. 1979) and appears as Pet. App. "D". The District Court's prior orders denying Petitioners' Motion to Add Defendants and their Motion for Change of Venue are unreported and are reprinted as Pet. App. "E" and "F", respectively. The District Court's order and judgment dismissing the action are reprinted as Pet. App. "G" and "H".

## JURISDICTION

The Court of Appeals rendered its decision in this case on October 27, 1980. A timely petition for rehearing was denied on December 12, 1980, and a timely Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The principal statutes involved in this case are 28 U.S.C. § 1251(a), 28 U.S.C. § 1335(a), and 28 U.S.C. § 1404(a). 28 U.S.C. § 1251(a) provides:

> "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

28 U.S.C. § 1335(a) provides in relevant part:

> "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person . . . having in his . . . custody or possession money or property of the value of $500 or more, . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property . . . ."

28 U.S.C. § 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

This case also involves Sections 14104, 14791, and 14793-95 of the California Revenue and Taxation Code as well as Chapter 634 of the 1980 California Statutes, which made certain changes in these statutes. The relevant provisions of these statutes are set out in Pet. App. "I".

## STATEMENT OF THE CASE

This action was brought under the Federal Interpleader Act (28 U.S.C. § 1335) by Respondent William Rice Lummis, the Texas Administrator of the Estate of Howard R. Hughes, Jr. ("the Estate").[1] A.1. The principal Defendants named in the Complaint are the inheritance tax officials of California and Texas.[2] The First Amended Complaint asserts that these officials are seeking to tax the Estate on the basis of inconsistent claims that each of their respective states was Howard Hughes' domicile at death (A. 53) and requests the District Court to adjudicate the issue of domicile. A.68.

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1. At the time the Complaint was filed, there were two Administrators of the Estate in Texas and both were named as Plaintiffs. Since that date, however, one of the two Texas Administrators has died. R. IV, 673. The remaining Administrator, Respondent William Rice Lummis, continues to serve as the sole Texas Administrator of the Estate and the sole Plaintiff.

2. Also named as Defendants are the United States, the County Treasurer of the County of Los Angeles, and the Administrators of the Estate in Nevada, California, Louisiana, and Delaware. Because it found that the Administrators had identical interests, the District Court realigned them all as Plaintiffs. Pet. App. 3d. Plaintiff did not appeal from this determination nor did the Court of Appeals question this aspect of the District Court's decision.

The County Treasurer of Los Angeles was named as a Defendant because, at the time the complaint was filed, California law provided that he would receive a tiny percentage of the Estate if Hughes were determined to have been a California domiciliary. CAL. REV. & TAX. CODE §§ 14104, 14795. These statutes were later amended to remove the County Treasurer from California's inheritance tax procedure. CAL. STATS. 1980, Ch. 634, §§ 15.2, 28-32; *see* Pet. App. 19i, 36i. Because of this revision, the County Treasurer will no longer receive any funds from the Estate, even if Hughes is adjudged to have been a California domiciliary.

Before the present action was brought, California sued Texas in this Court, invoking the Court's original jurisdiction in reliance upon *Texas v. Florida*, 306 U.S. 398 (1939). In June, 1978, California's Motion for Leave To File Complaint was denied. *California v. Texas*, 437 U.S. 601 (1978). The Court gave no reason for denying the motion, but four Justices suggested in concurring opinions that resort to the original jurisdiction was unnecessary inasmuch as a determination of Hughes' domicile might be obtained in a federal district court pursuant to the Federal Interpleader Act.[3]

Three weeks after the decision in *California v. Texas*, the Estate filed the present action in the United States District Court for the Western District of Texas. A.1. Soon after the complaint was filed, the District Court entered a temporary restraining order prohibiting the California and Texas taxing officials from pursuing domicile-based inheritance tax claims in the courts of their own states or in any other forum. R.II, 26. This injunction was later continued by the Fifth Circuit. Order Granting Plaintiff's Motion for Injunction Pending Appeal, August 27, 1979.

Petitioners made two related motions in the fall of 1978. First, they asked the District Court to enter an order adding as defendants some twenty-two persons whom Respondent Lummis himself had recognized as the heirs of Howard Hughes. A. 21-22. Second, they moved for an order transferring the action to a neutral forum —the District of Colorado—which all parties concede was *not* the domicile of Hughes. A. 22-23. Petitioners urged that this case should not be heard in a forum whose jurors would have—through their residency and their interest in the treasury of their state's government—a personal interest in the outcome.[4] Both of these

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3. Although the Court had previously ruled in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937) that such an action was barred by the Eleventh Amendment, the concurring Justices in *California v. Texas* suggested that this holding had been undercut by *Edelman v. Jordan*, 415 U.S. 651 (1974). *See California v. Texas*, 437 U.S. at 601 (Brennan, J., concurring), at 608 n. 10 (Stewart, J., concurring), and at 615 (Powell, J., concurring).

4. California also moved in the alternative for transfer to California on the ground that it would be a more convenient forum for the witnesses. But this alternative motion was clearly framed as the least preferable of the two possible venue transfers; it was premised on the hypothesis that the District Court had *rejected* California's submission that the case should

(*continued*)

motions were denied by the District Court in November, 1978. Pet. App. "E" and "F".[5]

Following these decisions, Petitioners filed a Motion to Dismiss (A. 70-72), which was heard in tandem with a motion to dismiss previously filed by the Texas taxing officials. A. 14-20. In July, 1979, the District Court issued an order granting the motions, finding that subject-matter jurisdiction under the Federal Interpleader Act had not been established. Pet. App. "D". The court concluded that although the First Amended Complaint named some ten defendants, there was only one defendant—the County Treasurer of Los Angeles—who was both a "claimant" to property in Plaintiff's custody or possession and a "citizen of a state" for diversity purposes.[6] *Id.* at 3d-5d. The court thus held that the jurisdictional prerequisites established by Section 1335 had not been met. Respondent Lummis appealed from this order

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(*footnote continued*)
be heard in a neutral forum. Petitioners' reply brief in the district court thus stated:

> "The Estate[ ] . . . also contends that the disadvantages which California claims disqualify Texas from being an appropriate forum for this action also apply to California. . . . The point is too clever by half. If this Court's ruling is that the case should be heard in a disinterested forum, as we have argued in Part I, *supra*, then we would agree with the Estate: Texas is no less entitled to a neutral forum than California. That is the very reason that California's motion sought, in the first instance, a transfer to Colorado. But Texas is no *more* entitled to a neutral forum than any other party. If this Court *rejects* California's thesis that a disinterested forum is preferable and required in the circumstances of this case, then the motion should be decided on the remaining grounds of convenience to witnesses and parties." R. II, 236-37.

5. These orders were later withdrawn and reissued by the District Court, with the revised orders adding a certification under 28 U.S.C. § 1292(b). The Court of Appeals later held that this certification was unnecessary since these orders were merged into the District Court's final order of dismissal; as a result, the appellate court eventually reviewed the merits of these rulings. The orders reprinted in Appendices E and F are the revised orders.

6. Although Petitioners and the Texas taxing officials are also interpleader "claimants", the District Court held that they were not "citizens of a state" for purposes of diversity jurisdiction. Pet. App. 4d; *see* p. 27, *infra*. As to the remaining defendants (*see* note 3, *supra*), the court found that the United States was similiarly not a "citizen of a state" for diversity purposes and held that the Defendant Administrators were not "claimants" to money or property of the Estate. *Id.* at 2d-3d.

and Petitioners cross-appealed, contending that the District Court's denial of their motions to add parties and change venue was erroneous.[7]

On appeal, the Fifth Circuit reversed the District Court's finding of lack of interpleader jurisdiction, but affirmed its orders denying Petitioners' motions. Pet. App. "A". The court held that Respondent Lummis, as Texas Administrator of the Estate, is a "claimant" under the Interpleader Act, and that "the citizenship of an interested stakeholder [*i.e.* Lummis] may be considered for purposes of establishing diversity under section 1335." *Id.* 11a Since Respondent Lummis' citizenship was diverse to that of the County Treasurer of Los Angeles, the court held that interpleader jurisdiction was established. *Id.* On the issues presented by California's cross-appeal, the court held that joinder of the prospective heirs was unnecessary (*id.* 12a) and that the District Court did not "abuse its discretion in denying the transfer of venue motion." *Id.* at 4a n.5. A timely Petition for Rehearing was denied on December 12, 1980. Pet. App. "B".

On January 16, 1981, Petitioners filed a second Petition for Rehearing, together with a motion for leave to file that petition out of time. This petition was based on a recently enacted California statute which, as part of a general overhaul of the state's inheritance tax law, eliminated the interest of the County Treasurer of Los Angeles in the Hughes Estate.[8] Petitioners urged that this change in California law warranted dismissal of the action. Since the Court of Appeals had determined that the County Treasurer was one of the two adverse and diverse claimants required for interpleader jurisdiction, Petitioners contended that the District Court's jurisdiction had been eliminated because the

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7. Because the District Court concluded that it lacked subject matter jurisdiction of the case, it did not reach the United States' contention that the interpleader action against it was barred by 28 U.S.C. § 2201. Because the District Court did not determine this issue, the Court of Appeals remanded it to that court for decision. Pet. App. 13a n.14.

8. The statute (AB 2092; 1980 Cal. Stats., Ch. 634), which became effective on January 1, 1981, repealed Sections 14791-95 of the California Revenue and Taxation Code (which previously had provided for payment of inheritance taxes in the first instance to the County Treasurer and retention by him of a "commission" to cover expenses of collection) and amended Section 14104 of the California Revenue and Taxation Code to require payment of the tax to the State Controller. AB 2092, §§ 15.2, 28-32; *see* Pet. App. 19i, 36i. These provisions "apply to all estates, effective January 1, 1981." *Id.* § 46; *see* Pet. App. 38i.

County Treasurer was no longer an interpleader "claimant," leaving only one such claimant who was also a citizen of a state (Respondent Lummis). Petitioners' motion for leave to file the out of time petition for rehearing was summarily denied on January 23, 1981. Pet. App. "C".

## SUMMARY OF ARGUMENT

This case presents for review the decision of the Fifth Circuit that a federal district court sitting in Austin, Texas, has jurisdiction over and is the appropriate forum to resolve a controversy between the taxing officials of California and Texas and the Hughes Estate over Howard Hughes' domicile for death tax purposes. Unless reversed by this Court, the decision of the Fifth Circuit will compel Petitioners to try this controversy in a federal district court sitting in Texas, and thereby to submit California's claim that Hughes was a California domiciliary at death to jurors who are residents of a state—Texas—with a rival, inconsistent claim.

Petitioners submit that this would be unseemly and unfair. A jury of Texas citizens is an inappropriate forum to resolve the competing tax claims of California and Texas against the Estate, for several reasons. *First,* due to the enormous (and well-publicized) size of the Estate, each Texas juror would surely know that a finding of Texas domicile would provide substantial additional revenue to the State of Texas, resulting either in reduced taxes or increased public services and benefits. Each Texas juror would thus have a personal stake in the outcome of this controversy, as would his family, friends, and all other citizens of the State of Texas. A trial by jury in Texas federal court fails to afford Petitioners the neutral fact-finder required by the Due Process Clause.

*Second,* trial of this action in Texas runs the risk that the subjective feelings of Texas jurors about their home state could distort their objectivity concerning the intent of Howard Hughes to make his home elsewhere. Determining domicile in a death tax case inevitably involves a subjective judgment as to the decedent's intent, a judgment which should not be made by a jury which might be influenced by local and/or regional pride.

*Third,* a Texas forum for this action is inappropriate because of the publicity engendered by the prior state court domicile trial between Texas and the Estate. Because of that publicity, it will

be difficult, if not impossible, to find jurors in Austin who will not know that a prior jury of their peers found Howard Hughes to be a Texas domiciliary.

*Fourth,* trial of this action in Texas would offend the appearance of justice, as well as its actuality. It would ask too much of California's citizens to believe that a verdict by Texas jurors finding a Texas domicile and rejecting California's rival tax claim was the result of careful deliberation rather than the factors listed above.

*Fifth,* and finally, trying this controversy between California and Texas in the latter state is an affront to federalism. The purpose behind the grant of original and exclusive jurisdiction to this Court to resolve controversies between states was to ensure that the resolution of multi-state conflicts would occur in a forum of equal dignity with the character of the litigants. No state has ever been forced to litigate a controversy with another state before jurors who were citizens of the latter state. That precedent should not be set now.

In rejecting these considerations, and holding that California's tax claim must be litigated before a jury of Texas citizens, the Court of Appeals committed four principal errors. *First,* as we show in Part I, *infra,* its holding that the District Court has jurisdiction of this action under the Federal Interpleader Act (28 U.S.C. §1335) is at odds with 28 U.S.C. §1251(a), which gives this Court "original and exclusive jurisdiction of all controversies between two or more States." This action presents a controversy between states because the claims of California and Texas against the Estate are mutually inconsistent and, once interpleader has been invoked, both cannot prevail. California and Texas are presently adverse not only to the Estate, but also to each other.

Nor, as Texas contends, does the Federal Interpleader Act create an implied exception to the Court's exclusive jurisdiction under Section 1251(a). Nothing in the legislative history of the Act demonstrates a Congressional intent to create an exception to the Court's original jurisdiction over controversies between states. Indeed, after the Interpleader Act was enacted, the Judicial Code was revised specifically to make the exclusive character of the Court's original jurisdiction over controversies between states explicit. And the most recent amendment of Section 1251(a) underscores the Congressional desire that the Court's jurisdiction over controversies between states remain exclusive.

*Second,* even if district court jurisdiction of this case were not precluded by Section 1251(a), the action could not be maintained under the Interpleader Act. *See* Part II, *infra.* The Act requires that the parties to the action include at least two claimants to property in plaintiff's custody or possession, who have diverse citizenship as defined in the diversity statute. This prerequisite has not been met.

The Court of Appeals upheld interpleader jurisdiction because it found both the Texas Administrator of the Estate and the County Treasurer of the County of Los Angeles to be adverse, diverse claimants. The Texas Administrator of the Estate is the interpleader stakeholder (i.e., the party which brought the interpleader action and which controls or possesses the fund at issue), and the citizenship of a stakeholder should not be considered in determining whether the jurisdictional prerequisites of the Interpleader Act have been met. *See* Part II(A), *infra.* The Court of Appeals' holding to the contrary would radically expand statutory interpleader jurisdiction, so that statutory interpleader would completely swallow "rule interpleader" under Rule 22 of the Federal Rules of Civil Procedure and destroy its jurisdictional minimum of $10,000.

Similarly, the Court of Appeals' conclusion that Petitioner Alvord is an interpleader "claimant" is no longer correct. *See* Part II(B), *infra.* On January 1, 1981, a general revision in California's inheritance tax procedure eliminated the role of the County Treasurer in collecting inheritance taxes; thus, Alvord will no longer receive a penny from the Hughes Estate even if Hughes is ultimately determined to have been a California domiciliary. Hence he is no longer an interpleader "claimant" and his presence cannot support jurisdiction.

*Third,* this action is barred by the Eleventh Amendment. *See* Part III, *infra.* This case presents no substantial allegation that California's effort to tax the Estate is unconstitutional or illegal. Hence this suit is one against the State itself and cannot be maintained consistently with that Amendment.

Parts I, II, and III demonstrate that the Court of Appeals erred when it upheld interpleader jurisdiction over this action. But if the Court finds otherwise, it must then determine whether trial of this action under the Interpleader Act should occur in Texas or in a forum whose residents and jurors are not citizens of a state with a domicile claim of its own.

The District Court declined to transfer this action not because it rejected California's "neutral forum" principle, but because no interpleader "claimant" presently a party to this action resides in such a state. Such a transfer would have been possible, however, if Petitioners' Motion to Add Defendants had been granted. That motion, filed simultaneously with Petitioners' Motion for Change of Venue, sought to add as parties to this action the acknowledged heirs of Howard Hughes, one of whom resides in the District of Colorado. The Court of Appeals precluded transfer to a neutral forum because it held that the heirs did not have to be joined.

This ruling, too, was in error. *See* Part IV(A), *infra*. The heirs must be joined because, under California law, they will be personally liable for the payment of any inheritance taxes due. Even if, as the Estate contends, the heirs are in privity with the administrators, their joinder is required by Fed. R. Civ. P. 19(a)(2)(i), since they would be persons with an interest in the action whose "absence may . . . as a practical matter impair or impede [their] ability to protect [their] interest . . . ." And, contrary to the holding of the Court of Appeals, Rule 17 of the Federal Rules of Civil Procedure does not supersede the general joinder requirements of Rule 19; since the heirs will be personally liable for the tax if California domicile is found, their joinder is required.

The joinder of the heirs would permit this action to be transferred to the neutral forum sought by Petitioners. This transfer will avoid the dangers described above and ensure that if California is compelled to try its case against Texas and the Estate in a federal district court, both the actuality of justice and its appearance will be achieved.

## ARGUMENT

### INTRODUCTION

In this case, the Court is called upon to decide whether Howard Hughes' domicile shall be determined in a statutory interpleader action in a United States District Court sitting in Austin, Texas, to which the Estate and the taxing officials of California and Texas are parties. An alternative course of proceeding is proposed in California's companion Motion for Leave to File Complaint in *California v. Texas*, No. 88, Orig., which urges this Court to accept original jurisdiction over the controversy. A third possibility is that the tax claim of each state may be determined in

separate state court proceedings, albeit with the risk of inconsistent adjudications of domicile. Serious and complex issues of jurisdiction and federal procedure are presented.

But looming over these questions, and informing their resolution, are fundamental considerations of policy and fairness. From the Estate's point of view, of course, the overriding consideration is the risk of inconsistent state court determinations of domicile leading to the imposition of taxes exceeding the available assets of the Estate. California agrees that the federal system should provide a remedy which could sensibly avoid that result. *See California v. Texas*, 437 U.S. 601, 616 (1978) (Powell, J., concurring).

But from the point of view of the rival claimant states, another consideration—equally fundamental and compelling—is presented: the fairness and suitability of the procedure to be employed in resolving these inconsistent tax claims. The solution proposed by the Fifth Circuit in this case—a statutory interpleader action—means that the rival tax claims of two states will be decided by jurors who are citizens of one of those states.

28 U.S.C. § 1397 provides that an interpleader action may be brought in any judicial district where one or more of the claimants reside. Ordinarily, *all* of the potential claimants will reside in one or the other of the states which claim domicile.[9] In such cases, venue will only be proper in one or the other of the claimant states, and a disinterested forum will be impossible. Moreover, because the stakeholder—the estate—initiates the suit, it will be able to lay venue in the state with the lowest death tax rate. That is precisely what occurred in this case.[10] Transfer under 28 U.S.C. § 1404(a) is limited to alternative venues in which the action

9. The "claimants" will ordinarily be the states seeking to collect a domicile-based death tax and, possibly, the estate's executors or administrators for those states.

10. Because the Texas inheritance tax rate is only 16% (the amount of the federal tax credit), it will make no difference to the Estate whether Texas or Nevada is determined to be Hughes' domicile. However, the Estate has a substantial interest in defeating the claim of California, since its 24% tax exceeds the federal credit and hence would not be paid by the Hughes heirs exclusively from dollars which would otherwise go to the federal government.

might have been brought in the first instance.[11] The result is that, under the decision of the Court of Appeals, California will be compelled to submit its tax claim for judgment by jurors who are citizens of the State of Texas.[12]

This Court is not required to blind itself to the blatant unfairness, and unseemliness, of this procedure. In this highly publicized case, involving the life of a legendary figure of contemporary American history and tax claims totalling hundreds of millions of dollars, can it be possible that our federal system requires California to submit its tax claim to a jury of Texas citizens whose interest in the outcome is patent?

Although the precise amount of the taxable estate has not yet been determined, all concede that it is enormous. Using the $468 million value found by the Internal Revenue Service,[13] a finding of Texas domicile would generate taxes and interest of $85.7 million. *See* Plaintiff's Reply Brief in Support of Motion for Leave to File Complaint in *California v. Texas*, No. 88, Orig., at 6-7 and A-1; *see also* A. 123. With approximately 14,228,300 residents of Texas (*see* U.S. Dept. of Commerce, Bureau of the Census, "Census of Population and Housing", Texas (March, 1981)), the financial interest of each juror on a *pro rata* basis would be $6.02. Each Texas juror would surely know that a finding of domicile would mean substantial additional revenue to the State of Texas, resulting either in reduced taxes or increased services

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11. By limiting the parties to citizens of the competing states, the Estate sought to foreclose transfer to a disinterested forum. This strategy may well succeed unless the joinder of additional parties residing in other states is ordered. *See* pp. 39-45, *infra*.

12. Undoubtedly, Texas will demand a trial by jury, as it did in the prior state court domicile trial. That demand may well be justified. *See Ross v. Bernhard*, 396 U.S. 531, 541 n. 15 (1970) (jury trial right may be applicable to legal issues presented in interpleader action despite equitable nature of remedy); *Lipscomb v. Lipscomb*, 265 F.2d 822 (D.C. Cir. 1959); *Shafer v. Children's Hosp. Soc'y*, 265 F.2d 107 (D.C. Cir. 1959) (jury trial required to decide issue of decedent's domicile). *Cf.* 28 U.S.C. §§ 1346(a)(1), 2402 (jury trial right available in action contesting federal taxes).

13. The California Inheritance Tax Referee preliminarily determined the value to be approximately $1.1 billion, considerably greater than the IRS figure. R. I, 107. Texas has said that its preliminary analysis is somewhere in between, but "closer" to the IRS figure than the California one. Texas' Brief in Opposition in *California v. Texas*, No. 88, Orig., at 10.

and benefits.[14] A tax of this magnitude would itself exceed the total inheritance tax revenues for the 1980 fiscal year, which amounted to $75.6 million.[15] It would also have constituted nearly 1.2% of the *total* tax receipts of the State of Texas in that year.[16]

The jurors' personal stake in the controversy—shared by each of their fellow citizens—makes a trial by jury in Texas federal court inconsistent with the disinterested trier of fact required by the Due Process Clause.[17] *Tumey v. Ohio*, 273 U.S. 510 (1927) (village mayor who received $12 in costs if defendant convicted has disqualifying self-interest); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (invalidating conviction by mayor's court where mayor, in addition to judicial functions, possessed executive responsibility for village finances which were affected by fines levied in his court); *Connally v. Georgia*, 429 U.S. 245 (1977) ($5 fee for issuing search warrant disqualifies magistrate).[18]

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14. Revenues from the Texas inheritance tax are maintained in the State's "General Revenue Fund" which is "the major state operating fund from which most agencies are financed." *State of Texas 1977 Annual Financial Report* 18-19, R. I, 99 and Exhibit E-3.

15. *See State of Texas 1980 Annual Financial Report* 3. The record contains the 1977 Report (*see* note 14, *supra*), in which year the comparable figure was $66.6 million. *See* R. I, 99 and Exhibit E-1.

16. The total tax collections of the State of Texas were $6,343,-800,000. 1980 Report at 3. The 1977 figure is approximately $4.4 billion. *See* R. I, 99 and Exhibit E-1.

17. In the ordinary tax case, there are only two sides: the state and the taxpayer. Jurors are both citizens and taxpayers. While they have an interest in maximizing their state's revenue (and the courts have recognized that appeals to the pecuniary interests of juries in tax cases are improper (*see, e.g., Epperson v. United States*, 490 F.2d 98 (7th Cir. 1973)), jurors may also have sympathy as taxpayers for the individual or corporation against whom the tax is being asserted. Hence jurors bring to the ordinary tax case no preconceptions which might tip the scales of justice. But because this case is at bottom an *interstate* controversy, there are three relevant parties, not two: Texas, California and the Estate. A Texas juror might, as a Texan, be sympathetic with the State of Texas and, as a taxpayer, have a countervailing identification with the Estate. But he would be unlikely to feel empathy for California's tax claim.

18. This line of cases is underscored by the Court's recent decision in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). There the Court confronted an attack on the enforcement of the Fair Labor Standards Act by the Employment Standards Administration (ESA) of the Department of Labor, based on the fact that the ESA received civil penalties assessed

(*continued*)

Trial of this action in Texas would also run the risk that the parochial effects of local and regional pride could have an effect upon the jury. Howard Hughes was a distinguished American who pioneered in aviation, film production and business and—financial benefits aside—any state would be proud to claim him as its own. The determination of domicile in a death tax case inevitably involves conflicting interpretations as to the decedent's mental intent—that is, which state the decedent considered to be his "home". In this case, to be specific, Texas claims that Hughes' domicile of origin was never superseded and that, despite his *de minimis* physical presence within the state of Texas after 1926, Hughes never abandoned his intention that Texas remain his permanent home. If the case were tried in Texas, this inherently subjective determination would be open to the risk that, despite instructions to the contrary, jurors would use their personal feelings about their home state of Texas as a guide to divining the intention of the decedent. Moreover, the pride and affection which each Texas juror justifiably has for the State of Texas would make the jury uncommonly receptive to emotionally charged appeals and evidence, such as Mr. Hughes' past statements about Texas, which either a Special Master appointed by this Court or jurors drawn from other states could view dispassionately. Arguments and evidence calculated to tap the roots of regional chauvinism—which, if the prior Hughes domicile trial in the Texas

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(*footnote continued*)
under the Act as reimbursement for the costs of determining violations and assessing penalties. Noting that the "requirement of neutrality has been jealously guarded" (*id.* at 242), the Court nonetheless rejected the due process challenge, holding that "the strict standards of *Tumey* and *Ward*" were not applicable to the ESA, which acted as a prosecutor rather than a judge in Fair Labor Standards cases. *Id.* at 243. (The actual determination of such cases was performed by the Office of Administrative Law Judges, which received no funds whatever under the statutory scheme.) But the clear intimation of the opinion is that if *Tumey* and *Ward had* been applicable, the fact that the decision maker's agency would financially benefit from a favorable decision would have violated the Due Process Clause. It follows that the same prohibition would prevent a juror from adjudicating a case the result of which would be to cause a substantial benefit to accrue to the juror's home state unless, of course, no alternative forum were available.

probate court is any guide,[19] are to be expected—are a significant threat to fair adjudication in a death tax domicile dispute tried to jurors who are citizens of one of the contending states.

The danger that the decision in this action, if tried in Texas, might be influenced by considerations of self-interest or regional pride would be exacerbated by the substantial prior publicity

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19. For example, counsel for Texas made the following statement in his closing argument to the jury in the previous state court trial:

> "I think this is as good a time as any to explain that our chief witness in this case has been Howard Hughes, and we have tried to bring you what Mr. Hughes said, and I think that you all realize that there are times in a man's life or person's life . . . where you say things with more seriousness than you do at other times, and I believe we can point out to you that when there was a really serious event, that Mr. Hughes became a Texan and was a Texan and said he was a Texan for the world to hear.
>
> "And the first such event that I will speak to, now, is this 1938 reception. He is back *here*, at his boyhood home. He is at the Rice Hotel, and I read to you from the paper what he said, . . . the paper said, 'Bashful as a school boy and just as captivating, Mr. Hughes dug down in his pocket and brought out a wad of notes from which he spoke. 'If you don't believe I wrote this, myself, just try to read the handwriting,' he said. 'Coming from Texas, particularly if it's a person flying around the world,' Mr. Hughes said, 'there is nothing you can see anywhere that you can't see in Texas. After you have flown across Texas, two or three times the distance around the world doesn't seem so great. We didn't see any mountains on our trip that were any steeper than the mountains in West Texas. We didn't see any plains that were any broader than the plains of Central Texas, and we didn't see any swamps that were any wetter than the swamps of Southeast Texas.'
>
> "Now that is what Mr. Hughes said about his state, and he said it *here* and he said it to people who were *here* welcoming him home; and I want you to pay close attention as we bring you, today, a recap of all the statements that Mr. Hughes ever made about Texas, *because you are going to be asked to believe by the Administrators that he declared himself an ex-Texan, that he didn't like Texas, that he left it in 1925 and never thought about it again. And I want you to listen closely and think about all the statements that Mr. Hughes made about Texas, and I want you to think as to whether or not you could refer to your state in the way that he referred to Texas in 1938, here in Houston, if it didn't mean something just a little special to him.* And you are going to be asked to believe that this Texas domicile is a fixation that exists only *here in Texas.*" (Reporter's Transcript, February 15, 1978, at 22-24 (emphasis added)).

We do not suggest that any aspect of this argument was improper. But it is self-evident that references to the jurors' *own feelings* about their home state of Texas are inherently likely to have a special impact upon a Texas jury.

accorded to the prior state court domicile trial between Texas and the Estate. As with everything Howard Hughes touched, the Hughes probate proceedings have engendered an enormous amount of publicity, much of it generated by the prior domicile trial in the Texas state courts. The record reveals that the Austin press has devoted extensive coverage to the tangle of legal proceedings which have developed since Howard Hughes' death with, of course, particular emphasis on the domicile trial. *See* R. I, 105 and attached Exhibits. Should this action be tried to a jury in Austin, it will be exceedingly difficult, if not impossible, to find jurors who have not heard about—and been influenced by—the prior state court proceedings relating to Howard Hughes.[20]

For these reasons, each potential juror—no matter how well intentioned and how carefully instructed by the District Court—would face a host of obstacles in attempting to arrive at an impartial verdict. Because of the enormous size of the Estate, he or she would know that a verdict finding a Texas domicile could result in a personal tax saving and a like tax saving for every fellow Texan, a measurable and costless increase in public services, or a combination of both. As a Texan, the juror might be drawn by deep-seated feelings about Texas in ways which would benefit one side of the case to the detriment of the other; a Texas juror would be receptive, as a citizen of another state would not, to appeals to regional chauvinism. *See, e.g.,* note 19, *supra.* Each juror would also be acutely aware that a previous Texas jury had found Hughes to be a Texas domiciliary. While each of these factors might be influential in its own right, together they significantly jeopardize the possibility of a fair trial.

Moreover, trial of this action in a forum with a domicile claim of its own would raise serious questions not only of the actuality

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20. Of course, coverage of the Texas state court proceedings was not confined to the Texas press. But the record reveals that it was vastly more extensive. For example, the Austin paper had five times the number of such stories than the Denver *Rocky Mountain News*. *See* R.II, 244 and Exhibits B-1 and D-1.

But more fundamentally, the impact that any given quantum of coverage has on the average reader, or potential juror, surely depends to a large extent on the individual's own interest in the subject and, hence, on his or her residence. It cannot be doubted that press coverage of the prior verdict by a *Texas* jury finding a *Texas* domicile for Mr. Hughes has a greater impact in Austin than in Denver.

of impartial justice but also of the appearance of it. A federal interpleader trial will surely generate as much or more publicity as the prior Hughes probate litigation. Should this action be tried in Austin and a finding of Texas domicile result, the suspicion will inevitably be created—despite the most diligent efforts of the District Court to assure a fair trial—that the verdict was the result of the economic, emotional and personal considerations discussed above, rather than a product of careful deliberation on the evidence presented. Certainly the citizens of California would not perceive that justice had been done.

Finally, it would be difficult to imagine a greater affront to federalism than a trial of the California and Texas tax claims before a jury of Texas citizens. Throughout our history it has been regarded as inappropriate to compel a state to resort to the tribunals of another state for redress. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971) (cataloguing reasons behind grant of original jurisdiction for suits betwen states and citizens of other states); *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 288 (1888) (same); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475-76 (1793) (same); 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1681 (4th ed. 1873) (reasons for exclusive jurisdiction of Supreme Court over interstate controversies). Here, the controversy in not simply between a state and citizens of another state, but one which involves the rival claims of two states. Adjudication of such a case by a jury drawn from the citizens of *one* of those states is unprecedented and fundamentally unfair.

A trial such as is proposed, in which the rival tax claims of two states will be adjudicated, has never before been held in a United States District Court. The unfairness, and overall unseemliness, of the process to which California would be subjected, is avoidable. As we shall now demonstrate, there are two possible solutions to this controversy which avoid the fundamental unfairness of requiring one state to litigate its tax claims before jurors of the rival state while still affording a "single, binding adjudication of domicile." *California v. Texas*, 437 U.S. 601, 610 (1978) (Stewart, J., concurring). In our view, the only available federal forum is an original proceeding in this Court under the authority of *Texas v. Florida, supra. See* Part I, *infra;* Motion for Leave to File Complaint, *California v. Texas*, No. 88, Orig. Indeed,

for the reasons stated in Parts I, II, and III, *infra*, the Federal Interpleader Act does not and cannot provide for jurisdiction to resolve this case. But if the Court holds to the contrary and finds that a statutory interpleader action is available in this case, then the question of venue must be addressed. In Part IV, *infra*, we show that the District Court should have joined improperly omitted parties, at least one of whom resides in a non-claimant state, thereby making possible a transfer of the action to a disinterested forum under 28 U.S.C. § 1404(a).

## I.

## DISTRICT COURT JURISDICTION IS BARRED BY 28 U.S.C. § 1251(a) BECAUSE THIS IS A CONTROVERSY "BETWEEN TWO . . . STATES" WITHIN THIS COURT'S EXCLUSIVE JURISDICTION

If the decision of the Court of Appeals in this case were to stand, then for the first time in our nation's history two states would litigate rival tax claims to the same fund in a United States District Court. Indeed, to our knowledge, that would also be the first occasion in which a district court adjudicated *any* controversy between two states.

The reason, of course, is 28 U.S.C. § 1251(a), which gives this Court "original *and exclusive* jurisdiction of *all controversies between two or more States.*" (Emphasis added). While this Court has only concurrent jurisdiction over other kinds of controversies within the original jurisdiction under Article III, Section 2, Clause 2 (*see* 28 U.S.C. § 1251(b)), controversies between states may only be heard here.[21]

This case involves precisely such a controversy. California and Texas each seek to impose a tax based upon the alleged domicile of the decedent. Each state adheres to the common-law definition

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21. The statutory grant of exclusive jurisdiction to the Court over "*all* controversies betwen two or more States" (emphasis added) so obviously precludes other courts from adjudicating such disputes that it is not surprising to find little authority in this Court supporting the proposition that the statute means what it says. However, the Court recently observed in a suit brought against Louisiana by several states and the United States that although the United States could sue Louisiana in a district court under Section 1251(b), such a suit "necessarily would not include the plaintiff States . . . ." *Maryland v. Louisiana*, — U.S. —, 49 U.S.L.W. 4562, 4567 (1981). When attempts have been made to file cases within the Court's original and exclusive jurisdiction in the lower courts, more-

(*continued*)

of domicile.[22] Each state's law embraces the concept that an individual has but one domicile at any time.[23] The very purpose of the statutory interpleader action brought by the Estate is to eliminate the possibility of inconsistent, multiple taxation by *both* California and Texas. *See California v. Texas, supra,* 437 U.S. at 608 n.9 (Stewart, J., concurring). This necessarily means that if one state wins, the other must lose. The filing of this interpleader action has therefore locked California and Texas into an adversary position, and has created a "controvers[y] between two or more States" of the most concrete kind.

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(*footnote continued*)
over, they have been unequivocally rejected. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n,* 61 F.R.D. 588 (D.D.C. 1974); *Friedberg v. Santa Cruz,* 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949); *DeMiglio v. Paez,* 189 N.Y.S.2d 593, 18 Misc. 2d 914 (1959).

*Arizona v. New Mexico,* 425 U.S. 794 (1976), is not to the contrary. There the Court denied Arizona leave to file a bill of complaint seeking to invalidate a tax imposed by New Mexico on the New Mexico generating facilities of three Arizona utilities. The suit was brought by the state in its proprietary capacity and as parens patriae. The Court held that resort to the original jurisdiction was unnecessary, because the issues which Arizona sought to tender to the Court were being litigated in the New Mexico state courts by the affected utilities. The Court also was "not unmindful that the legal incidence of the electrical energy tax [was] upon the utilities" (*id.* at 797-98), not the state itself. A real interstate controversy thus probably was not present.

The present case is quite different. Here there is no doubt that it is the state itself—and not a third party—which is the real party in interest. Moreover, unlike *Arizona v. New Mexico,* this case involves the states themselves in their sovereign capacity. *See Maryland v. Louisiana,* ..... U.S. ....., 49 U.S.L.W. 4562, 4573 (Rehnquist, J., dissenting). The issue of Hughes' domicile for death tax purposes therefore cannot be litigated by third parties in another forum.

22. *See Smith v. Smith,* 45 Cal. 2d 235, 243-44 (1955); *Estate of Glassford,* 114 Cal. App. 2d 181, 186 (1952); 6 B. Witkin, SUMMARY OF CALIFORNIA LAW, Parent and Child § 4 (8th ed. 1974); *Snyder v. Pitts,* 241 S.W.2d 136, 139 (1951); *Van Hoose v. Moore,* 441 S.W.2d 597, 615 (1965); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 13, Comment a (1971). *Cf. Texas v. Florida,* 306 U.S. 398, 413 (1938) (noting general uniformity of state common law regarding domicile).

23. *See Estate of Glassford,* 114 Cal. App. 2d 181, 186 (1952); *Snyder v. Pitts,* 241 S.W.2d 136, 139 (1951); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971); J. Beale, A TREATISE ON THE CONFLICT OF LAWS § 11.2 (1935).

This conclusion is not inconsistent with the Court's 1978 denial of California's motion for leave to file an original complaint against Texas. Nor is it inconsistent with Justice Stewart's statement in his concurring opinion that, as matters then stood, the real controversy was between each taxing state and the Hughes Estate, and not between California and Texas themselves. 437 U.S. at 611-12. While we disagree with that proposition (*see* Memorandum in Support of Motion for Leave to File Complaint, *California v. Texas*, No. 88, Orig., at 28-39), it is important to understand that an entirely different situation is presented here. In 1978, there were separate tax proceedings pending in each of the two states. Neither state was a party to the proceeding in the other's court. That led Justice Stewart to conclude that "it would be of no possible concern to either California or Texas that the other might adjudge Hughes a domiciliary and succeed in taxing his estate . . . ." *Id.* at 611.

That statement plainly no longer holds now that the Estate has invoked federal interpleader. As a result, California and Texas have now involuntarily been joined as opposing claimants. As their claims are mutually inconsistent, no more than one state can prevail. The filing of the statutory interpleader action has made the competing states—who previously were free to proceed without regard to the actions of the other state—litigation adversaries. For that reason, the interpleader suit involves a "controvers[y] between two . . . States" with the ambit of Section 1251(a).[24]

Nevertheless, Texas has urged that the Federal Interpleader Act creates an implied exception to the Court's exclusive jurisdiction under Section 1251(a). It relies on three cases[25] which upheld district court jurisdiction of particular suits by the *United States* against a state even though the predecessor of Section

24. The Texas Respondents, at least, have not denied that the rival claimants in this action are the states of California and Texas, rather than their respective taxing officials. Indeed, they have conceded that this action presents a controversy between states, since their motion to dismiss the action for lack of jurisdiction stated that "[t]he non-estate claimants here are in reality California and Texas." R. III, 338; *see also* A. 14-16.

25. *United States v. California*, 297 U.S. 175 (1936); *Case v. Bowles*, 327 U.S. 92 (1946); *Minnesota v. United States*, 125 F.2d 636 (8th Cir. 1942).

1251—28 U.S.C. § 341 (1940)—was understood to have given this Court exclusive jurisdiction of such suits.[26]

Those cases express a limited principle which is inapplicable to this one. They merely held that despite the general grant of exclusive jurisdiction in former Section 341 over suits between the United States and a state, "concurrent jurisdiction might on occasion be given the district courts by *special jurisdictional provisions overriding the general provision in* § 341." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 251 (2d ed. 1973) (emphasis added). For several reasons, this exception to the Court's exclusive jurisdiction under Section 1251(a) is inapplicable here.

In each of these cases, the statute providing for district court jurisdiction had been enacted *after* the original jurisdiction statute, and was found to constitute an implied exception to it.[27] In this case however, the Federal Interpleader Act was adopted in 1936, twelve years *before* the 1948 revision to the Judicial Code in which Congress made explicit its intent that the Court's jurisdiction over controversies *between states* be exclusive.[28] Prior to 1948, "Section[]

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26. Since 1948, of course, Section 1251(b) has made the Court's original jurisdiction of suits between the United States and a state concurrent.

27. Thus, in the leading case, *United States v. California, supra,* the Court cited three cases for the proposition that Section 341's grant of exclusive original jurisdiction was superseded by the grant of jurisdiction to the district courts under the Federal Safety Appliance Act. *United States v. Yuginovich,* 256 U.S. 450 (1921); *United States ex rel. Chandler v. Dodge County,* 110 U.S. 156 (1884); and *United States v. Tynen,* 78 U.S. (11 Wall.) 88 (1871). None of these cases has anything to do with jurisdiction; rather, they all stand for the principle that "a later statute repeals former ones when clearly inconsistent with the earlier enactments." *United States v. Yuginovich,* 256 U.S. at 463, citing *United States v. Tynen, supra.* Hence, the linchpin of these cases is not a jurisdictional principle, but rather a canon of statutory construction which, as shown in text, is inapplicable to this case.

28. The 1948 revision of the Judicial Code (62 Stat. 927) replaced former 28 U.S.C. § 341 (1940) with 28 U.S.C. § 1251. Former Section 341 provided

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction. . . ."

341 . . . did not confer expressly exclusive jurisdiction on the Supreme Court in civil cases between States . . . ." Reviser's Note, 28 U.S.C. § 1251. The 1948 revision was intended to eliminate any ambiguity and to delineate clearly which aspects of the Court's original jurisdiction were exclusive and which were not. *Id.* Suits between states were put within the Court's exclusive jurisdiction (§ 1251(a)), while jurisdiction over suits between a state and the United States was made concurrent. § 1251(b). In short, the Interpleader Act preceded, rather than followed, the legislation confirming the Court's exclusive jurisdiction over controversies between states. Accordingly, it cannot be said here that the *subsequent* enactment of a statute providing for district court jurisdiction of a particular class of action has modified an earlier grant of exclusive jurisdiction in this Court.

Even if the order of enactment of the Interpleader Act and the Judicial Code revision had been reversed, Texas' argument would falter. The ultimate issue is the intent of Congress, and canons of construction such as those employed in *United States v. California,* (*see* note 27, *supra*) are no more than aids to discerning legislative intent. Neither the history of the Federal Interpleader Act nor of the present Judicial Code remotely suggests any intent on the part of Congress to allow the range of disputes which are grist for the statutory interpleader mill to be adjudicated in a district court when the parties to the dispute are sovereign states.

The Federal Interpleader Act was enacted in 1936 (49 Stat. 1096), and was a substantial expansion of the prior law which essentially limited federal statutory interpleader to actions brought by insurance and casualty companies and sureties. 39 Stat. 929; 43 Stat. 976; 44 Stat. 416; *see* 7 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE (hereafter "WRIGHT"), Civil, § 1701. The 1936 Act substantially broadened the availability of interpleader and liberalized its provisions. *Id.*

The language used in the Act itself refutes any suggestion that Congress intended to create an exception to the Court's exclusive jurisdiction over controversies between states. 28 U.S.C. § 1335 requires that the defendants be "two or more adverse claimants, of diverse citizenship as defined in section 1332"—*i.e.*, "citizens of different states." But it had long been held that neither a state nor a state officer sued in his or her official capacity is a "citizen of a state." *E.g., Postal Telegraph Cable Co. v. Alabama,* 155 U.S. 482

(1894). The selection of this language—which necessarily precludes the use of statutory interpleader to resolve disputes where the claimants are states or state officials[29]—is persuasive evidence that Congress did not envision the use of statutory interpleader to resolve such controversies. Nor is there the slightest suggestion in the Act's legislative history, which includes a comprehensive report of the Senate Judiciary Committee (S. REP. 558, 74th Cong., 1st Sess; *see also* H.R. REP. 1437, 74th Cong., 1st Sess.), of any intent to create district court jurisdiction for interpleader suits in which two or more states are adverse claimants. Indeed, the language of the Senate Report suggests that controversies between states were far from contemplation of Congress.[30]

Likewise, the history of the 1948 Judicial Code revisions suggests no intent of Congress that federal interpleader be an exception to the Court's exclusive jurisdiction under Section 1251(a). The language actually used by Congress, of course, suggests no exception: "The Supreme Court shall have original and exclusive jurisdiction of *all* controversies between two or more States." (Emphasis added). Moreover, as noted above, this language was the result of a conscious effort by the revisers to eliminate an ambiguity in the prior statute. The revisers were well aware that some cases, including two of the three cited by Texas, had allowed suits brought by the United States against a state, even though the Court's jurisdiction over such suits was thought to be exclusive.

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29. Indeed, it is only because of the atypical presence in this case of an interested stakeholder residing in Nevada *and* the County Treasurer of Los Angeles—both deemed by the Court of Appeals to be additional "claimants"—that jurisdiction under the Interpleader Act was held to exist. *See* pp. 28-29, *infra.*

30. For example, the Senate Report stated:

> "Many important *businesses* which are vexed by similar claims from *residents of different states* remain outside the scope of [the prior] legislation. . . . [T]he benefits of this remedy could be justly extended to *other businesses.*"
>
> * * * *
>
> "The Committee have had constantly in mind the rights of the *private citizens* who are asserting claims against *the various corporations* that might file bills of interpleader, and has so drawn the bill as to protect and further the interests of these claimants." (S.REP., at 3-4 (emphasis added)).

*See also* H.R. REP. at 2. *None* of the examples given in the report of the kinds of problems which could be resolved under the proposed legislation involve conflicting claims of state governmental bodies.

*See* Reviser's Note to 28 U.S.C. §1251, *supra*. Against that background, they proposed, and Congress enacted, a new Section 1251 which made the jurisdiction over "all" suits *between states* exclusive while the jurisdiction over suits *between the United States and a state* was made concurrent. Thus Congress at once codified the cases on which Texas now relies as to suits between a state and the United States but at the same time stated unambiguously that *"all"* suits between states be within the exclusive jurisdiction of this Court.

The latest revision of Section 1251(a) underscores the importance which Congress has attached to the Court's exclusive jurisdiction over controversies between states. In 1978, because Congress felt that the Court "should not be burdened with such litigation on its original docket" (1978 U.S. Code Cong. & Admin. News 1935, 1946), Section 1251 was amended to make the Court's original jurisdiction over actions and proceedings against ambassadors and public ministers of foreign states concurrent rather than exclusive. Diplomatic Relations Act, § 8(b), Pub. L. 95-393, 92 Stat. 810 (1978). Yet Congress did not disturb the grant of exclusive original jurisdiction over controversies between states. Thus, Congress' latest word on the subject was to confirm that the Court's jurisdiction over controversies between states—but no others—remains exclusive.[31]

Of course, it should come as no surprise that Congress gave no thought to the use of federal statutory interpleader as a means of resolving death tax or other disputes between states or to the crea-

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31. Congress knows how to create exceptions to the Court's original and exclusive jurisdiction over controversies between states when it chooses to, but it has chosen to do so only once. 33 U.S.C. § 466g-1(c) (providing for district court jurisdiction over suits between states which have signed compacts relating to pollution of an interstate river system). And on the one occasion in which Congress has exercised this power, it has made *consent* of the state a precondition to its being sued in federal district court. 33 U.S.C. § 466g-1(a)(1)(B). The fact that Congress has only created district court jurisdiction over controversies between states once and, when it did, made that jurisdiction dependent on the defendant state's prior consent strongly cautions against inferring an intent on the part of Congress to create district court jurisdiction over unsuspecting and nonconsenting states through the Interpleader Act. It should not be lightly inferred that Congress has done impliedly what it has never done explicitly. *Cf. Touche Ross & Co. v. Reddington*, 442 U.S. 560, 571 (1979).

tion of an exception to this Court's exclusive jurisdiction over controversies between states for actions brought under the Interpleader Act. Until recently, the prevailing understanding of the Eleventh Amendment was that it imposed a constitutional barrier to such suits, so that any attempt to create jurisdiction in a district court would have been futile. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).[32]

The cases on which Texas relies are quite different on another level, as well. In those cases, Congress' intent to establish district court jurisdiction for suits by the United States against a state could fairly be implied from the circumstances, for the jurisdictional provisions were an integral part of a precise federal regulatory scheme in which enforcement proceedings were to be brought in a district court.[33] By contrast, the Interpleader Act is a procedural vehicle for the resolution of a wide range of disputes. *See* 7 WRIGHT, *supra*, Civil § 1702. Moreover, in *United States v. California, supra*, the Court stressed that enforcement actions of the kind involved there were local controversies, requiring the presence of local witnesses (297 U.S. at 188), a factor plainly inapplicable to domicile disputes such as this one. Congress had no reason to view multi-state death tax disputes over domicile as local controversies requiring resolution in a local court. Indeed, in light of the blatant unfairness of trying the rival state tax claims in a federal

32. The principles articulated in *Worcester County* were surely understood by the Congress which, only a year earlier, enacted the Interpleader Act, to say nothing of the Congress which revised the Judicial Code in 1948. It was not until the last few years that those principles were opened to question. *See California v. Texas*, 437 U.S. 601, 608 n.10, 615 (1978) (concurring opinions).

33. *United States v. California*, 297 U.S. 175 (1936) was a suit to enforce provisions of the Federal Safety Appliance Act. The Court said that "[s]ince the section which . . . imposes the liability . . . also provides the remedy and designates the . . . court in which the remedy is to be pursued" (*id.* at 188), it appeared that Congress intended to allow such suits to be brought in a district court. Likewise, *Case v. Bowles*, 327 U.S. 92 (1946), was an action to enforce the Emergency Price Control Act, which by its terms applied to the states. *Id.* at 99-100. That statute gave the district court jurisdiction over all enforcement suits (*id.* at 97), and the Court held this to be an exception to the exclusive original jurisdiction over suits between the United States and a state.

court sitting in one of the two claimant states (*see* pp. 11-16, *supra*), it is inconceivable that Congress intended to authorize it.

There is, in short, no principled basis for inferring an intention on the part of Congress silently to create an exception to the Court's exclusive jurisdiction over controversies between States. Indeed, the notion of such implied exceptions to Section 1251(a) is a radical one, which would significantly change the historic understanding of the Court's original jurisdiction. Other grants of jurisdiction to the district courts might just as easily be regarded as implied exceptions to Section 1251(a). For example, if one state sought to sue another for an antitrust violation or violations of a federal statute otherwise affecting commerce (*see, e.g., California v. Texas*, No. 87, Orig.), under Texas' theory of implied exceptions, the matter could be heard in a district court. The same might be true of suits involving a federal question by one state against another. *E.g., Maryland v. Louisiana, supra* (federal statutory preemption and federal unconstitutionality of state tax); *Arizona v. California*, 373 U.S. 546 (1963). These exceptions to Section 1251(a) would devour the rule. Congress surely meant to establish a firmer principle of jurisdiction than that when it provided in Section 1251(a) that "the Supreme Court shall have original and exclusive jurisdiction of *all* controversies between two or more States." (Emphasis added).

It should be said that although a decision that the Interpleader Act is not an implied exception to the Court's exclusive jurisdiction over controversies between states may eliminate the possibility of some alternative forums for cases such as this, it would not necessarily compel the Court to accept jurisdiction of each such controversy. The question of the jurisdiction of a district court to hear a lawsuit between two states is analytically distinct from the question of whether the Court *must* exercise jurisdiction in a given case.

The latter question is somewhat delicate and sophisticated. The Court has imposed prudential limitations upon the exercise of its original jurisdiction. *See, e.g., Arizona v. New Mexico*, 425 U.S. 794 (1976) (leave to file suit between states denied where issues would be resolved between other parties in alternative forum); *Maryland v. Louisiana*, — U.S. —, 49 U.S.L.W. 4562, 4566 (1981) quoting from *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); Note, *The Original Jurisdiction of the Supreme Court,*

11 Stan. L. Rev. 665, 694-700 (1959). The observation in *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939) that the Court would "inquire whether recourse to that jurisdiction . . . is necessary for the State's protection" implies that *some* cases within the literal boundaries of the Court's exclusive jurisdiction would nevertheless not be heard. Moreover, the requirements for the invocation of the Court's equitable jurisdiction are strictly observed. Thus Justice Stewart argued in *California v. Texas, supra*, that, as of three years ago, the controversy between California and Texas as to Hughes' domicile had not sufficiently matured to permit the invocation of this Court's original jurisdiction. 437 U.S. at 613-15. While we disagree with that analysis (*see* Memorandum in Support of Motion for Leave to File Complaint, *California v. Texas*, No. 88, Orig., at 28-39), it is enough at present to say that the issues presented here are distinct. The Court could conclude that this case presents a controversy between two or more states and thus cannot be litigated, at least by them (*see Arizona v. New Mexico, supra*), in a lower federal court, even if the Court is not prepared to regard the controversy as one worthy of its original jurisdiction.

Thus, while we do indeed urge the Court to exercise its original jurisdiction to resolve the present controversy between California and Texas (*see* Motion for Leave to File, *supra*), we recognize that this conclusion would not automatically follow from a reversal of the Court of Appeals' judgment, for that reversal might not necessarily address the equitable and prudential objections to the exercise of original jurisdiction advanced by Justice Stewart in *California v. Texas, supra*, or by Texas in opposition to California's companion motion.

In any event, whatever the ultimate disposition of California's Motion for Leave to File Complaint, the present case cannot be heard in a federal district court. The decision of the Court of Appeals is at odds with both the plain language of Section 1251(a) and the American legal tradition—now almost two centuries old—that controversies between states may only be resolved by this Court. The decision of the Court of Appeals is therefore erroneous and should be reversed.

## II.

## THIS ACTION DOES NOT MEET THE JURISDICTIONAL PREREQUISITES OF THE FEDERAL INTERPLEADER ACT

Even if jurisdiction in this case were not precluded by 28 U.S.C. § 1251, jurisdiction could not be had under the Federal Interpleader Act. The Act requires that the parties to the action include at least two "adverse claimants, of diverse citizenship as defined in [28 U.S.C.] section 1332" who are claiming money in Plaintiff's custody or possession. 28 U.S.C. § 1335. The identity and citizenship of the "claimants" in turn depend on the identity of the real parties in interest, since it is the citizenship of the real parties, not that of the nominal ones, which controls for diversity purposes.[34]

While the Complaint in this action named as Defendants the taxing officials of California and Texas (A. 1), it is readily apparent that the real parties in interest—and thus the true interpleader "claimants"—are the taxing states themselves, who will receive any taxes collected if they prevail or be restrained from collecting taxes if they do not. States, however, are not "citizens of a state" for diversity purposes (*Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482 (1894)) and neither are state taxing officials sued in their stead.[35] The District Court thus held that the individual state taxing officials named as defendants in this action were not "citizens of a state" who could support jurisdiction. Pet. App. 4d. This holding was not questioned by the Court of Appeals.

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34. WRIGHT, *supra*, Civil, § 1556, p. 710 ("The general rule is that the citizenship of the real party in interest is determinative in deciding whether diversity jurisdiction exists"); 3A MOORE'S FEDERAL PRACTICE ¶ 17.04, p. 17-27. *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421 (1823).

35. *See State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194 (1929) (state commission held to be "alter ego" of state and thus not a citizen for diversity purposes). As to taxing officials specifically, *see People ex rel. McColgan v. Bruce*, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942); *Craig v. S. Natural Gas Co.*, 125 F.2d 66 (5th Cir. 1942); *Riley v. Worcester County Trust Co.*, 89 F.2d 59 (1st Cir.), *aff'd on other grounds*, 302 U.S. 292 (1937); *Robertson v. Ingram-Day Lumber Co.*, 271 F. 1023 (5th Cir. 1921); *Robertson v. Jordan River Lumber Co.*, 269 F. 606 (5th Cir. 1921); *Kansas City Southern R.R. Co. v. Morley*, 88 F. Supp. 300 (W.D. Ark. 1950); *Query v. 206 Cases of Assorted Liquor*, 49 F. Supp. 693 (W.D.S.C. 1943).

Because of these jurisdictional principles, interpleader jurisdiction can be successfully invoked only if the plaintiff can show the existence of two parties other than state taxing officials who are *both* adverse claimants to the fund at issue *and* citizens of different states. In a domicile dispute as is presented here, this will rarely occur, as the proper parties to such cases will normally include only the estate (represented by an executor or administrator) and the several claimant states. Thus, in the prototypical dispute of this kind—between an executor and several states—statutory interpleader jurisdiction will be unavailable.

The Court of Appeals' finding of interpleader jurisdiction in *this* case was based on a combination of unlikely factual circumstances and incorrect conclusions of law. Out of all the parties named, it found only *two* which it regarded as "claimants" who were also "citizens" of diverse states. It first held that if a stakeholder is "interested" in the fund—that is, if it asserts an entitlement to it—then it is also a "claimant" whose citizenship can be considered for jurisdictional purposes. Pet. App. 10a-11a. The court concluded that Respondent Lummis, as the Texas Administrator, met this criterion. *Id.* 10a. As for the second of the two necessary diverse claimants, the court seized upon Petitioner Alvord, the County Treasurer of Los Angeles. Under the prior law of California, the death tax was paid to the county treasurer, who retained a small percentage as a commission and remitted the balance to the State. *See* note 3, *supra.* But, as we shall now show, each prong of this analysis is seriously flawed.

*First,* the holding of the Court of Appeals that the citizenship of an interested stakeholder can be considered for purposes of establishing interpleader jurisdiction is incorrect, and would lead to a radical and wholly unwarranted expansion of federal jurisdiction. *See* Part II(A), *infra.*[36]

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36. The Court of Appeals found that the Texas Administrator is an "interested" claimant because he has a legal duty to preserve the Estate's assets. Pet. App. 10a. But if all the states seeking to assert inheritance taxes against an estate would apply the same tax rate, the estate would be a disinterested stakeholder whose citizenship could *not* be considered in determining interpleader jurisdiction. *Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939). The same would be true if all the states were among the many whose tax rates were equal to or below the amount allowed as a credit against the federal estate tax. The only claimants in such cases would be the states themselves and interpleader jurisdiction could not be established. This case was different only because the California tax rate (24%) exceeds the Texas tax of 16%.

*Second*, even if the stakeholder is interested and may properly be considered as a "claimant" for jurisdictional purposes, a second diverse "claimant" must be found. The Court of Appeals found such a claimant in this case due to the happenstance that, at the time the Complaint was filed, the County Treasurer of the County of Los Angeles stood to receive a tiny percentage of the Hughes Estate if Hughes were ultimately determined to have been a California domiciliary. *See* note 3, *supra*. But this feature of California law has now been repealed. *See* note 8, *supra*. For reasons explained in Part II(B), *infra*, that statutory change destroyed any jurisdiction that may once have existed in the present case.[37]

### A. The Court of Appeals Erred in Holding That the Citizenship of a Stakeholder Should Be Considered in Determining Whether Interpleader Jurisdiction Exists

The Court of Appeals sustained interpleader jurisdiction because it found that Plaintiff's citizenship (Nevada) was diverse to that of the County Treasurer of Los Angeles (California), and that both Plaintiff and the County Treasurer were "claimants" under the Federal Interpleader Act. Pet. App. 11a.-12a. In so holding, the court explicitly held that the citizenship of an interpleader plaintiff who, in addition to being a stakeholder, also claims an interest in the fund may be considered for purposes of determining whether interpleader jurisdiction exists. *Id.* 11a. Because jurisdiction under the Federal Interpleader Act is premised upon the existence of at least two adverse claimants of diverse citizenship, the decision below necessarily means that the conflicting claims of just *one* interested plaintiff and *one* defendant to a specific fund are a sufficient basis for jurisdiction under the Act. This holding would have a radical, and plainly un-

37. It bears emphasis that *each* of these factors was necessary to the Court of Appeals' decision and that, without any one of them, jurisdiction would not have been established. If, in a future case, the estate is disinterested or neither state happens to share its tax proceeds with a local official, interpleader will not lie. Nor will interpleader be proper in any such case if the Court were to hold that the citizenship of an interested stakeholder may not be considered for purposes of determining interpleader jurisdiction. *See* Part II(A), *infra*. For these reasons, interpleader will rarely, if ever, be an available remedy for the resolution of death tax controversies between states.

desirable, effect on fundamental principles of federal jurisdiction, as several examples illustrate.

*First*, consider the case in which an insurance company or other institution holds a sum of money which is claimed by X, and X alone. The insurer, a citizen of State A, disputes the claim of X, a citizen of State B. Under the Court of Appeals' opinion, the insurer (which is "interested in" the funds it holds by virtue of its challenge to X's claim) would be a "claimant" of diverse citizenship to X, also a claimant, and could invoke federal jurisdiction under the Federal Interpleader Act. Why should this be permitted? These hypothetical facts describe a garden-variety dispute between two parties which could be settled in state court, or a federal court under general diversity jurisdiction if the $10,000 jurisdictional minimum is satisfied. But if interested stakeholders are "claimants," then nearly every bilateral dispute could be framed to invoke federal interpleader jurisdiction, thereby obtaining for the plaintiff nationwide service of process (28 U.S.C. § 2361) and a greatly reduced jurisdictional minimum. *Compare* 28 U.S.C. § 1332(a) *with id.* § 1335(a) ($500 jurisdictional minimum).

*Second*, if an interested stakeholder is a "claimant" for purposes of Section 1335, it must also be a "claimant" for purposes of venue under Section 1397, which provides that statutory interpleader actions must be brought where one or more claimants reside. By alleging an interest in the fund, the stakeholder could bring the action in the place of its own residence. Thus, if a Delaware insurer who altogether denies liability seeks to interplead a dozen claimants all residing in California (or there, Washington and Oregon), it could compel them to litigate their claims in Delaware, without regard to their prior contacts with that state.

*Third*, as the first example demonstrates, the jurisdictional minimum of Section 1332 would be largely frustrated. Virtually *every* "rule interpleader" action, previously thought to have been based on general diversity, could be recast under the Federal Interpleader Act whenever the stakeholder is interested in the fund.[38] There is no indication that Congress intended the Act

38. The prototypical rule interpleader case is one in which the plaintiff-stakeholder is in State A and the defendants-claimants are co-citizens of State B. Such actions fall comfortably within Section 1332 so long as the $10,000 jurisdictional requirement is satisfied.

wholly to displace interpleader actions brought under the usual diversity jurisdiction of the district courts where the $10,000 jurisdictional minimum is not present and where there is no special need for a federal forum with nationwide service. Yet that would be the inevitable result of the Court of Appeals' reinterpretation of Section 1335.[39]

These serious, adverse consequences of the Court of Appeals' holding would not be accompanied by any measurable benefits. Even if the citizenship of the stakeholder administrators who would ordinarily bring an interpleader action to resolve an interstate death tax controversy could be considered for jurisdictional purposes, interpleader jurisdiction could not be successfully invoked unless the administrators also named a defendant who was simultaneously both a "claimant" and a "citizen of a state." For the reasons discussed above, the state taxing officials named as defendants will not be able to fill this jurisdictional lacuna. *See* p. 27, *supra*. While the Court of Appeals in this case found that such an additional defendant existed in the person of the County Treasurer of Los Angeles, this finding was premised on California statutes, since repealed, which gave the County Treasurer a tiny percentage of the Estate if Hughes were adjudged ultimately to have been a California domiciliary. But this "solution" to the jurisdictional problem will not be available in future disputes of this kind. Thus, even if one assumed that the greatly increased burdens on the federal judiciary created by the Court of Appeals' interpretation of the interpleader statute could be justified in the interest of sparing this Court's original jurisdiction of the necessity to resolve interstate death tax disputes by providing an alternative forum, no such benefit will in fact be attained. The Court of Appeals decision should be reversed to avoid a radical and unwarranted expansion of federal jurisdiction.

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39. Neither the cases cited by the Court of Appeals (*Builders & Developers Corp. v. Manassas Iron & Steel Co.*, 208 F. Supp. 485, 488 (D. Md. 1962) and *Pan Am. Fire & Cas. Co. v. Revere*, 188 F. Supp. 474, 477 & n.8 (E.D. La. 1960)), nor Professor Wright, upon whom the court below also relied (Pet. App. 11a.), appear to have considered most of these serious disruptions to the federal jurisdictional scheme which would be caused by treating an interpleader plaintiff as a claimant for jurisdictional purposes.

### B. The Court of Appeals' Finding of Jurisdiction Has Been Superseded by Changes in California Law

As noted above, the Court of Appeals found interpleader jurisdiction to exist in this case because it found the requisite minimal diversity between Respondent Lummis, the Texas Administrator, and Petitioner Alvord, the County Treasurer of the County of Los Angeles. Jurisdiction was thus found to exist in this case solely because of the unusual circumstance that, under California law at the time the Court of Appeals opinion was rendered, the *state* death tax was collected by a *county* treasurer, who retained a tiny fraction of the tax as compensation for that administrative service and was required to remit the balance to the State of California. Because the citizenship of a county officer, unlike that of a state officer, may be considered for diversity purposes, Petitioner Alvord was held to be a claimant and a citizen of California, of diverse citizenship with Respondent Lummis.

On January 1, 1981, however, California law regarding inheritance tax procedure was completely revised. On that date, AB 2092 (Chapter 634 of the California Statutes of 1980), became effective. This statute repealed Sections 14791-95 of the California Revenue and Taxation Code (which previously had provided for payment to the County Treasurer of the inheritance tax, retention by him of a "commission" and transmittal to the state of the balance) and amended Cal. Rev. & Tax. Code § 14104 to require payment of the tax to the State Controller. Pet. App. 19i, 36i. These statutory changes eliminated Petitioner Alvord's interest in the Hughes inheritance tax, as he is no longer entitled to receive a portion of any inheritance tax paid after January 1, 1981.[40] Pet. App. 38i.

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40. Although legislative "motive" is irrelevant to any issue before this Court, we nevertheless wish to assure the Court that the 1980 revision to California's inheritance tax law—and specifically the elimination of the county treasurer's participation in death tax collections—was entirely independent of this case and made without any consideration (or even appreciation) of the effect it would have on federal interpleader jurisdiction here. As can be seen from an examination of the legislation (which is reprinted as Pet. App. "I"), the revisions are extensive. The particular provisions concerning the role of the county treasurers had been proposed for many years. Special counsel for California played no role, direct or indirect, in the formulation of this legislation.

Whatever may have been the case when the Court of Appeals rendered its original decision, it is now clear that Alvord is no longer a claimant to any portion of the funds which are the subject of the interpleader action (*i.e.*, the Hughes Estate); in the language of the Act, Alvord is no longer a person who is "claiming or may claim to be entitled to . . . money or property" in the stakeholder's custody or possession. 28 U.S.C. §1335. Because Alvord is no longer a "claimant," he is not a proper party and the action against him must be dismissed. The required presence of at least two adverse claimants of diverse citizenship does not now exist, and federal interpleader jurisdiction thereby fails. *See Kennametal, Inc. v. International Union*, 161 F. Supp. 362 (W.D. Pa. 1958) (abandonment of claim by one of two claimants terminates jurisdiction under §1335); *Dakota Livestock Co. v. Keim*, 552 F.2d 1302, 1306 (8th Cir. 1977).

Respondents invoke the rule that jurisdiction is ordinarily measured as of the date the complaint is filed, and urge that this subsequent development be ignored. But it has long been settled that where the addition or deletion of a party *after* the complaint has been filed affects the existence of diversity of citizenship, jurisdiction must be re-determined in light of that changed circumstance. This principle has been applied in a wide variety of contexts:

> (1) The joinder of additional defendants whose citizenship is the same as the plaintiff will destroy diversity jurisdiction. (Accordingly, the courts often state that such joinder should not be allowed or required unless such defendants are indispensable parties.)[41]
>
> (2) Similarly, the joinder of an additional plaintiff who is a citizen of the same state as a defendant will oust the court of jurisdiction.[42]

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41. *E.g.*, *Stanhope v. Ford Motor Credit Co.*, 483 F. Supp. 273 (W.D. Ark. 1980) (removed case remanded to state court where plaintiff amended complaint to add nondiverse defendant); *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624, 628-29 (2d Cir. 1976); *Haas v. Jefferson Nat'l. Bank*, 442 F.2d 394 (5th Cir. 1971) (dismissal after District Court had ordered joined an indispensable party whose presence destroyed diversity); *Reynolds v. Wabash R.R. Co.*, 236 F.2d 387 (8th Cir. 1956); *Wallace v. Knapp-Monarch Co.*, 234 F.2d 853, 860 (8th Cir. 1956).

42. *E.g.*, *Adams Express Co. v. Denver & Rio Grande Ry.*, 16 F. 712 (C.C.D. Colo. 1883); *cf. Gaddis v. Junker*, 27 F.2d 156, 159 (E.D. Tex.

(*continued*)

(3) Conversely, when after the filing of the complaint the plaintiff undertakes to correct a defect of jurisdiction by dismissing non-diverse defendants, jurisdiction will be re-determined following such dismissal.[43]

(4) Where the original complaint includes two or more plaintiffs, some of whom are citizens of the same state as a defendant, the jurisdictional defect can be eliminated by dismissing the non-diverse plaintiff(s), following which jurisdiction is re-determined.[44]

(5) Intervention of an indispensable party who is a citizen of the same state as the intervenor's opposing party destroys diversity jurisdiction, as measured at the time of intervention.[45]

(6) Permissive intervention of a *non*-indispensable party who is a citizen of the opposing party's state also destroys jurisdiction.[46]

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(*footnote continued*)
1928) (treating intervenors who joined with the cooperation of plaintiffs as "in the category of plaintiffs" and holding that their joinder destroyed diversity jurisdiction); *Forest Oil Co. v. Crawford*, 101 F. 849 (3d Cir. 1900) (same).

43. *E.g., Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1068-69 (3d Cir. 1979); *Fetzer v. Cities Serv. Oil Co.*, 572 F.2d 1250, 1253 n.4 (8th Cir. 1978); *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572, 575-76 (5th Cir. 1976); *Finn v. Am. Fire & Cas. Co.*, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954). In *Finn*, the Court had determined on a prior appeal after a trial that the District Court lacked diversity jurisdiction; on remand, the District Court dismissed the non-diverse defendant and reinstated the judgment. The Court of Appeals held that by doing so, the District Court cured the lack of jurisdiction.

44. *E.g., Alderman v. Elgin, J. & E. R.R. Co.*, 125 F.2d 971 (7th Cir. 1942); *Drumright v. Texas Sugarland Co.*, 16 F.2d 657 (5th Cir.), *cert. denied*, 274 U.S. 749 (1927); *Allstate Ins. Co. v. Lumbermen's Mut. Cas. Co.*, 204 F. Supp. 83 (D. Conn. 1962).

45. *Chance v. County Bd. of School Trustees*, 332 F.2d 971 (7th Cir. 1964); *Kentucky Natural Gas Corp. v. Duggins*, 165 F.2d 1011, 1015 (6th Cir. 1948); *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926), *cert. denied*, 273 U.S. 758 (1927); *Fryer v. Weakley*, 261 F. 509 (8th Cir. 1919).

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46. *E.g., Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954); *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 197 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952) (allowing State

(*continued*)

In short, the presence or absence of diversity jurisdiction is re-determined *after* there has been an addition or elimination of a party.[47] By the same token, the question of interpleader jurisdiction—which depends on diversity—should now be re-examined in light of the statutory elimination of the County Treasurer's interest in this action.

That re-examination can have only one result. Because Petitioner Alvord no longer claims any property in Plaintiff's custody or possession (*i.e.*, any portion of the Hughes Estate), he is no longer a "claimant" within the meaning of the interpleader statute. The Court of Appeals' finding that interpleader jurisdiction existed in this case was based on a premise which is no longer applicable:

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(*footnote continued*)
of Texas to intervene was error because it was not a "citizen of a state" and, if uncorrected, its "presence would destroy the jurisdiction of the court"); *Johnson v. Riverland Levee Dist.*, 117 F.2d 711, 715 (8th Cir. 1941) (intervention with consent of plaintiff by a party residing in same state as defendant "destroys the jurisdiction of the court"); *Forest Oil Co. v. Crawford*, 101 F. 849 (3d Cir. 1900).

A different rule exists where the suit is a class action and the intervenor is a member of the class or where the controversy between the intervenor and the opposing parties is "ancillary" to the main action (as when the intervention is "as of right" under F.R. Civ. P. 24(a)). Neither of these rules is applicable here, either directly or by analogy. This is not a class action; and there is no "ancillary" dispute, the only issue before the Court being that of the domicile of Hughes for inheritance tax purposes.

47. A different rule applies when there is a *pro forma* substitution of one party for another, as where a party dies and his or her executor is substituted in. But even this exception does not govern where the substitution changes the nature of the action or the nature of the right asserted therein, in which event jurisdiction is re-determined as of the time of substitution. *Grady v. Irvine*, 254 F.2d 224 (4th Cir.), *cert. denied*, 358 U.S. 819 (1958); *see also Rippey v. Denver U.S. Nat'l Bank*, 42 F.R.D. 316 (D. Colo. 1967).

Professor Wright's Treatise states that "a change of parties, by addition, substitution, or elimination . . . will not divest the court of jurisdiction if the nature of the action remains the same . . . ." 13 WRIGHT, *supra*, § 3608, at 656-57. A careful reading of this section suggests that Professor Wright is referring here to the rules applicable to (1) *pro forma* substitution, as discussed in the preceding paragraph (*see id.* at 659-60); and (2) the addition of parties as a consequence of the *defendant's* action, as by impleader, compulsory counter-claim or cross-claim, which are treated as within the *ancillary* jurisdiction of the court. *See id.* at 657. Professor Wright does not suggest that the rules outlined in text are any different than those stated here.

there are no longer two claimants of diverse citizenship, but (at most) one.[48] Hence whatever jurisdiction may once have existed in the District Court vanished when Petitioner Alvord's claim to the Hughes Estate was eliminated by the change in California law.

## III.

## THIS ACTION IS BARRED BY THE ELEVENTH AMENDMENT[49]

In *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937), a unanimous Court, speaking through Chief Justice Stone, held an action identical to this one barred by the Eleventh Amendment. That decision has never been overruled, although four Justices of this Court have questioned its continuing validity. *California v. Texas*, 437 U.S. 601 (Brennan, J., concurring), 608 n.10 (Stewart, J., concurring), 615 (Powell, J., concurring).

The Court of Appeals refused to apply the Eleventh Amendment because it found that the relief sought against the California and Texas taxing officials in this case is prospective. Pet. App. 7a-8a. But even if that were so, the Eleventh Amendment inquiry does not end there. Under *Ex parte Young*, 209 U.S. 123 (1908), a suit against a state official alleged to be acting illegally or unconstitutionally may be maintained consistently with the Eleventh Amendment, since the official "is in that case stripped of his official or representative character . . . ." *Id.* at 160. But, as the District

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48. The Court of Appeals' refusal to reconsider interpleader jurisdiction in light of California's statutory revision has led to a bizarre result: jurisdiction has been sustained because of the happenstance that, under the law as it stood on the date the complaint was filed, Alvord held a tiny fraction of the California tax claim even though (1) the law has subsequently changed, and Alvord no longer holds any such claim or has the slightest interest in this case; (2) there is now only *one* proper party —the Texas Administrator—who could conceivably qualify as both a "claimant" and a "citizen" of a state under the Interpleader Act (and his citizenship may only be considered at the cost of radically expanding federal jurisdiction); (3) if an identical case arose tomorrow, it could not be brought in the district court under the Interpleader Act; and (4) all of this became clear before any final determination of the issue of jurisdiction in a case which has not yet passed beyond the pleading stage.

49. While this issue was not presented in the Petition for Certiorari, it is jurisdictional (*Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974)), and may therefore be considered by the Court. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277 (1980); *see* Stern and Gressman, SUPREME COURT PRACTICE 459 (5th ed. 1978).

Court found, there is no substantial claim here that the taxing officials of California and Texas are acting unconstitutionally and/or illegally in seeking to tax the Estate. Pet. App. 6d; *see also California v. Texas*, 437 U.S. 601, 612 & n.13 (Stewart, J., concurring). Since there is no substantial claim that Petitioners are acting illegally, the fiction of *Ex parte Young* does not apply. This action is therefore one against the State of California and thus barred by the Eleventh Amendment.

## IV.

## IF INTERPLEADER JURISDICTION IS UPHELD, TRANSFER UNDER 28 U.S.C. § 1404(a) IS REQUIRED

If, despite the jurisdictional arguments discussed in the prior sections, this case is to be heard in a district court pursuant to the Federal Interpleader Act, it will be imperative that the case be transferred to a forum whose citizens—and thus whose jurors—are wholly disinterested. Such a "neutral forum" is available in this case: the District of Colorado.

The compelling reasons for transfer in order to provide a fair trial on the issue of domicile have already been discussed. *See* pp. 11-16, *supra*. The District Court did not reject these arguments, but held that because no "claimant" presently a party to the suit resides in Colorado, or in any other state not claimed by some party to be the domicile of Howard Hughes, transfer under Section 1404(a) is foreclosed. Under Section 1404(a), an action may only be transferred to a district where it might have been brought in the first instance. *See Hoffman v. Blaski*, 363 U.S. 335 (1960). However, California moved under Rule 19 to add as parties persons who should have been joined in the first instance: the acknowledged heirs of Howard Hughes who, if a California domicile is found, will have *personal* liability for payment of the California death tax.[50] At least one of those heirs resides in the District of

50. California sought to join the twenty-two persons acknowledged by the Estate to be the lawful heirs of Howard Hughes. The Texas Administrator is a party to a settlement agreement among those heirs which stipulates that they are lawful heirs, and determines the percentage each is to take. A. 24-26, 31, 43, 128; R. I, 99 & Exhibits F. Although in the courts below it was suggested that other claimants to the Hughes Estate would also have to be joined, the articulation of that supposed concern is purely tactical. No party to this action asserts a belief that any of the

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Colorado. A. 24-25, 27, 34, 141-44. Had the heirs been joined, transfer to that district could have been accomplished.[51] It is there-

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(*footnote continued*)
some 400 others who have filed claims of heirship will establish an entitlement to participate in the Estate. Indeed, Plaintiff, as an administrator of the Estate, has disputed these various heirship claims in the Texas probate proceedings.

In any event, the Texas probate court has confirmed the claims of some fourteen maternal heirs—all parties to the settlement agreements—and the heirship claims on the paternal side are presently being tried. It is therefore likely that by the time this Court rules, the Texas probate court will have determined whether any of those other heirship claims has merit. Any person found to be a lawful heir of Hughes may, of course, be joined as an additional party. In the meantime, if either Texas or the Estate has a genuine concern that the omission of any of these persons might jeopardize the ability of the District Court to bind all interested parties, it is free to join them.

51. The Estate and Texas argued below that under *Hoffman v. Blaski*, 363 U.S. 335 (1960), the transfer standards of Section 1404(a) must be applied against the original complaint, and that the addition of additional defendants, residing in additional forums, if caused by the granting of a Rule 19 motion and the subsequent amendment to the complaint, could not be considered. This argument is without merit.

*Hoffman v. Blaski* held only that a *defendant* may not *create* a permissible venue transfer by waiving jurisdictional and venue objections to an otherwise impossible alternative forum desired by him. It does not hold, or even imply, that a *plaintiff* can *foreclose* venue transfers by omitting necessary parties. Nor does it address the situation in which an amended complaint is filed by the plaintiff or compelled by the granting of a Rule 19 motion.

Amended pleadings "supersede[ ] the pleadings [they] modif[y] and remain[ ] in effect throughout the action . . . ." 6 WRIGHT, *supra*, § 1476, p. 389. Transfer motions often occur after complaints have been amended. To our knowledge, every court which has faced this situation has looked to the amended complaint, not the original, to determine the potential transferee forums. *See, e.g., Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 447 F. Supp. 381 (N.D. Okla. 1978); *Weiss v. Sunasco, Inc.*, 295 F. Supp. 824 (S.D.N.Y. 1969) (motion for change of venue denied where defendants named in amended complaint not amenable to service in transferee forum); *Silbert v. Nu-Car Carriers*, 111 F. Supp. 357 (S.D.N.Y. 1953) (parties stipulated during hearing on change of venue motion that additional defendant could be joined; transfer denied because newly added defendant not amenable to suit in transferee forum). Other cases also demonstrate that it is the amended complaint, not the original one, to which courts look in passing upon change of venue motions. *E.g., Toro Co. v. Alsop*, 565 F.2d 998 (8th Cir. 1977); *Ipco Hospital Supply Corp. v. Les Fils d'Auguste Maillefer*, 446 F. Supp. 206 (S.D.N.Y. 1978); *(continued)*

fore necessary first to consider the Court of Appeals' holding that the motion to add parties was properly denied.

### A. The Motion to Add Parties Should Have Been Granted

Rule 19(a) requires joinder of persons "having an interest in the controversy . . . who ought to be made parties, in order that the court may . . . finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it."[52]

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*(footnote continued)*
*American Medicorp, Inc. v. Humana, Inc.*, 445 F. Supp. 573, 578 (E.D. Pa. 1977); *Securities & Exchange Commission v. Penn Central Co.*, 450 F. Supp. 908, 911 n.2 (E.D. Pa. 1978); *Watwood v. Barber*, 70 F.R.D. 1 (N.D. Ga. 1976); *see also Bastille Properties, Inc. v. Hometels of America, Inc.*, 476 F. Supp. 175, 178 (S.D.N.Y. 1979) (addition of new party under Rule 19(a) might make venue improper and necessitate transfer under 28 U.S.C. § 1406(a)) and *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 240 n.16 (8th Cir. 1979) (plaintiff could not object to transfer on ground that one defendant not amenable to service of process in transferee forum where district court dismissed that defendant from suit).

Of course, if the rule were otherwise, a defendant added to the complaint by amendment would be unable to move the court for transfer to his place of residence if no other defendant resided in that district. But that is not the law. *See Xerox Corp. v. Litton Industries, Inc.*, 353 F. Supp. 412 (S.D.N.Y. 1973).

These cases reflect a common-sense approach. A rule prohibiting the court from considering the presence of parties added by amended complaints would provide an incentive for plaintiffs to leave necessary parties out of their complaints in order to frustrate potential change of venue motions. To hold that the number of potential transferee forums remains forever fixed by the original complaint—even though the court later orders that defects in the complaint be remedied by joining defendants *who under Rule 19 should have been named in the original complaint*—would reward litigants for leaving out essential parties from their pleadings in violation of the Federal Rules. As the Court stated in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), "the limiting phrase of § 1404(a) should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just." *Id.* at 624.

52. Rule 19, as revised in 1966, raises two distinct questions, only one of which is presented in this case. The first, posed by Rule 19(a), is whether the absent persons *should* be joined if it is feasible to do so. The second question, addressed by Rule 19(b), arises whenever a person should be joined under Rule 19(a) but for some reason "cannot be made a party"; in that event, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or

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*Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1855).

The need for a judgment which binds the heirs as well as the various administrators of the Estate is rooted in aspects of the California inheritance tax law which differ in important respects from the federal estate tax. The California tax is *not* an estate tax levied on the estate as an entity, but a tax on the transfer of property which is levied upon the *transferee*. Thus, under California law, the heirs are "*indispensable part*[*ies*] to that portion of the proceeding in which inheritance taxes [are] fixed . . . ." *Allen v. Flournoy*, 26 Cal. App. 3d 774, 781, 87 Cal. Rptr. 275, 279 (1972) (emphasis added).[53]

The inability of the District Court to "finally determine the entire controversy, and do complete justice, by adjusting all the

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*(footnote continued)*
should be dismissed, the absent person being thus regarded as indispensable." The latter question is not presented here because there is no impediment to the addition of the heirs as parties. This is so because (1) a statutory interpleader action under 28 U.S.C. § 1335 requires only diversity between two or more claimants, and not complete diversity (*State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967)) and therefore the inclusion of Texas or California heirs would not destroy jurisdiction; and (2) there is nationwide service of process in a statutory interpleader action. 28 U.S.C. § 2361.

Accordingly, because the absent heirs *can* be joined, the only question posed by the motion is whether, under Rule 19(a), they *should* be joined. In other words, because the joinder of the absent heirs is feasible, the distinction between "necessary" and "indispensable" parties is irrelevant for present purposes.

53. *See generally Cohn v. Cohn*, 20 Cal. 2d 65, 68, 123 P.2d 833, 834-35 (1942); *Estate of Hendricks*, 11 Cal. App. 3d 204, 89 Cal. Rptr. 748 (1970); *Estate of McLaughlin*, 243 Cal. App. 2d 516, 520-21, 52 Cal. Rptr. 543, 545-46 (1966) and authorities cited; 23 CAL. JUR. 3d *Death and Gift Taxes* §§ 1, 120, 121.

The personal liability of the heirs for inheritance taxes is underscored by Section 14322 of the Revenue and Taxation Code, which authorizes the Controller in collecting the tax to levy upon *all* property of an heir, and not just assets distributed to him by the estate. Thus if the assets of the estate prove to be insufficient to pay the tax, or are lost during administration (*cf. Estate of Hite*, 159 Cal. 392, 113 Pac. 1072 (1911) (portion of estate embezzled); 18 Cal. Admin. Code § 13601.1 (transfer of assets lost during administration is nevertheless taxed)), the heir will be personally liable and his own assets may be reached. Liability for payment of the inheritance tax in California is not that of the estate or the administrator; *it is imposed upon the heirs and beneficiaries*. That liability is personal, and extends to their own assets.

rights involved in it" without the presence of the absent heirs is apparent in light of these fundamentals of state law. If the District Court were to proceed in the absence of the heirs and render a final judgment determining that Howard Hughes was a domiciliary of California, these federal proceedings would be at an end: Texas would be enjoined from attempting to collect a domicile-based tax, and California would be free to proceed in its own courts to value the Estate's assets and to collect death taxes according to its own laws. But there is a substantial risk that the heirs, *on whom the California death tax falls*, will not regard themselves as bound by a judgment to which they are not parties.

Plaintiff's response has been that the absent heirs are in "privity" with the Estate's administrators and will be bound by any judgment rendered against those administrators. While there is substantial reason to doubt that this is so,[54] that question need not be resolved, for whether or not the absent heirs are in privity with the administrators they must be joined.

If the heirs are *not* in privity with the administrators, then a classic case for joinder is established under Rule 19(a)(1), which requires joinder of a party "if . . . in his absence complete relief cannot be accorded among those already parties . . . ." If the purpose of a statutory interpleader here is "to obtain a *single, binding* determination of the decedent's domicile at the time of his death (*California v. Texas, supra* at 607 (Stewart, J., concurring) (emphasis added)), proceeding where the heirs are neither parties nor in privity with a party would fall short of that objective. Without the power to bind the heirs to a judgment affecting *their* personal

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54. The privity issue is a substantial one. Ordinarily, of course, an heir is bound by litigation concerning *estate* assets or *estate* liabilities to which the estate representative was a party. Indeed, in such suits, the heir is normally not even regarded as a *proper* party. See 3A MOORE'S FEDERAL PRACTICE ¶ 17.12, p. 17-149.

But here the suit involves potential tax liability of the *heirs*, not the estate as an entity. Unlike a suit on behalf of, or against, an estate, in which the heirs *cannot* participate as parties, the heirs *are* proper parties in a proceeding to fix inheritance taxes. *E.g.*, TEX. TAX.-GEN. ANN. art. 14.11(c)(3), (4); CAL. REV. & TAX. CODE § 14510. In the courts below, Texas and the Estate were unable to discover *any* authority that a non-party heir will be bound by an *in personam* judgment against a representative determining liability for state death taxes.

liability for death taxes, the "district court [would be unable] to finalize the litigation or to effectively adjudicate the rights of all concerned parties." *Broussard v. Columbia Gulf Transmission Co.*, 398 F.2d 885, 888 (5th Cir. 1968).

On the other hand, if—as the Estate contends—the heirs *are* in privity with the administrators, and would thus be bound by a judgment rendered in this case, then their joinder is required by Rule 19(a)(2) because they are persons who "claim[ ] an interest relating to the subject of the action and [are] so situated that the disposition of the action in [their] absence may (i) as a practical matter impair or impede [their] ability to protect [their] interest . . . ." Rule 19(a)(2)(i). The point is self-evident: a judgment of the District Court finding a California domicile (should that be its ruling), if binding upon the heirs through the doctrine of "privity," would lead to the imposition of a substantial tax liability upon each of them. No plainer case for the applicability of Rule 19(a)(2)(i) can be conceived.

This is precisely the holding of *Bry-Man's, Inc. v. Stute*, 312 F.2d 585 (5th Cir. 1963). In that case, a diversity suit was brought by one of two joint obligees of a debt. The other joint obligee, one McEvoy, was not joined, and was expected to litigate his claim in a state court. The Court of Appeals held that if McEvoy was *not* in privity there was the "highly inequitable" risk of inconsistent adjudications. 312 F.2d at 588 n.6. On the other hand, if McEvoy *was* in privity, his joinder would also be required:

> "On the other hand even if McEvoy in his suit in the state court were found to be bound by the previous action by Stute [in federal court] under the doctrine of res judicata as being a privy to that action, *then the other inequity to be prevented by the equitable doctrine of indispensability would raise its ugly head, viz., where adjudication would necessarily 'affect' the rights of the absent party. See* Restatement of the Law, Judgments, § 102. And *see Keegan v. Humble Oil & Refining Co.*, 5 Cir., 155 F.2d 971." (*Id.* at 588 n.6 (emphasis added)).

*Accord, Gottlieb v. Vaicek*, 69 F.R.D. 672 (N.D. Ill. 1975).

To our knowledge, no federal court has ever refused to join an otherwise necessary party, who could feasibly be joined, on the ground that it was in privity with a party. To the contrary, the

reported cases show exactly the opposite: a person in privity with an interest in the litigation must nevertheless be joined.[55] Certainly the text of Rule 19 suggests no such an exception. Indeed, it requires joinder where the court hearing the case is prevented by a party's absence from according "complete relief . . . among those already parties." Rule 19(a)(1). That standard is not met where "complete relief" requires a *second* suit, against one not party to the first, to enforce a judgment on a theory of privity.[56]

The Court of Appeals did not discuss any of these matters. It simply asserted that, under Rule 17, the administrator is a "real party in interest" who is authorized to sue in his own name without joining with him the estate's heirs for whose benefit the action is brought. Pet. App. 12a. In effect, the court engrafted an exception upon the general joinder requirements of Rule 19: if a party is a "real party in interest" purporting to represent the interests of non-parties, the non-parties need not be joined even though Rule 19 would otherwise require their joinder. In this, the Court of Appeals erred.

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55. *Reserve Min. Co. v. Environmental Protection Agency*, 514 F.2d 492, 533-34 (8th Cir. 1975) (en banc) held that it was proper for the District Court to have joined two parties (Aramco and Republic) as necessary parties under Rule 19(a)(1) even though they were in privity with parties to the proceedings. In *Willingham v. Star Cutter Co.*, 555 F.2d 1340, 1345 (6th Cir. 1977), a defendant's motion to join the co-owner of plaintiff's patent was granted notwithstanding the possibility that the absent owner would be barred by res judicata:

> "Finally, we consider the interest of a defendant in avoiding multiple suits concerning the same patent. Defendants in an infringement suit initiated by a single joint owner could have a justifiable fear that should they prevail and the court determine that the patent in suit is either invalid or not infringed, the remaining joint owners might still relitigate these issues at a later date in another costly and vexatious proceeding. Even though remaining joint owners might be bound under the traditional doctrines of collateral estoppel or res judicata, and despite the fact that such a repetitive suit may be an appropriate case for the awarding of attorney fees to defendants[,] defendants still could be prejudiced."

56. Since the heirs are not parties to this proceeding, they will be free to test the issue of their privity in a separate proceeding. For example, if the District Court were to find a California domicile, the absent heirs would be free to claim in a subsequent proceeding to collect the tax that they were not in privity with the administrators. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912). As a result, the

*(continued)*

Professor Wright describes the relationship between Rules 17(a) and 19 with characteristic clarity:

> "In order to apply Rule 17(a) properly, it is necessary to identify the law that created the substantive right being asserted by plaintiff. As is discussed more fully elsewhere, that question often involves problems of distinguishing between the substantive statutes creating the right being enforced by plaintiff and procedural statutes prescribing in whose name the action may be brought. And in some cases, it may raise difficult conflict of law questions.
>
> "The second sentence of Rule 17(a) contains a specific enumeration of a number of persons who are real parties in interest. The purpose of the listing is to provide guidance in cases in which it might not be clear who the real party in interest is and to emphasize the fact that he might not be the person beneficially interested in the potential recovery. Of course, the language assumes that the applicable substantive law gives the persons named in the rule the right to sue. *Although it has been argued that an exception to the joinder requirements of Rule 19 is created by the portion of Rule 17(a) stating that anyone listed 'may sue in his own name without joining with him the party for whose benefit the action is brought,' several courts have rejected this interpretation and have held that Rule 17(a) assumes that the joinder of those beneficially interested in the action is not otherwise required. As a result, Rule 19 always must be consulted to determine if all the necessary parties have been joined.*" (6 WRIGHT, *supra*, Civil § 1543, pp. 644-45 (emphasis added))[57]

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(*footnote continued*)
interpleader court *cannot* accord "complete relief" to California; that will require that a *second* court adjudicate the question of privity and hold that the heirs were bound by the District Court's judgment. Rule 19 forbids two lawsuits where the issues can be settled in one.

57. Until the Court of Appeals' decision in this case, the courts have uniformly regarded the standards of Rule 19 as fully applicable notwithstanding the presence of a "real party in interest" authorized to sue by Rule 17. "The determination that [plaintiff] is a real party in interest (*continued*)

The heirs are the persons who will be *personally* liable for the tax if a California domicile is found. Under Rule 19, their joinder is required.

### B. Transfer Under Section 1404(a) Is Required

With the joinder of the heirs, transfer under Section 1404(a) is permitted. Thus the sole ground given by the courts below for denying transfer will be swept away.

For the reasons already discussed (*see* pp. 11-16, *supra*), a trial of the rival Texas and California tax claims before a jury of Texas citizens would be inappropriate and unfair. Every Texas juror would know that the state of his or her citizenship would stand to gain a massive sum of money if a Texas domicile were found. They would also know that the pecuniary interest of each juror would be matched by an identical pecuniary interest for each man, woman and child in Texas. It asks a very great deal of fallible human beings to put knowledge of this kind aside. Our legal tradition does not require the citizens of California to trust that Texas jurors, sitting in judgment on California's rival tax claim, will achieve objectivity in the face of these formidable challenges.

Transfer to a district court not situated in one of the claimant states would serve some of the same ends as an original proceeding in this Court. Not only would the jurors be economically disinterested, but they would be immune from appeals to regional chauvinism—such as were made in the prior state court trial (*see* note 19, *supra*)—which could have grave impact on jurors drawn from the state claiming that Howard Hughes never abandoned his intent that Texas remain his permanent home.

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*(footnote continued)*
under Rule 17(a) . . . *does not dispose of the question of whether all necessary parties* to the litigation have been joined." *Int'l. Rediscount Corp. v. Hartford Acc. & Indem. Co.*, 425 F. Supp. 669, 676 (D. Del. 1977) (emphasis added). *Accord, Smallwood v. Days Transfer, Inc.*, 165 F. Supp. 929 (W.D. Mich. 1958); *Carlson v. Consumers Power Co.*, 164 F. Supp. 692 (W.D. Mich. 1957); *see also Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78 (4th Cir. 1973); *Capital Fire Ins. Co. v. Langhorne*, 146 F.2d 237 (8th Cir. 1945); *Brown v. Fisher Skylights, Inc.*, 31 F.R.D. 532 (E.D.N.Y. 1962); *Morelli v. Northwest Engineering Corp.*, 30 F.R.D. 522, 524 (E.D. Wis. 1962).

It is no answer to say that the District Court can be expected conscientiously to conduct *voir dire*. No amount of questioning can eliminate the taint of self-interest. Moreover, whatever may be the ability of a conscientious district judge to so carefully screen prospective jurors as to minimize the dangers of a less than impartial trier of fact, no one will be under the illusion that such a trial will *appear* fair to the citizens of California. While our traditions of federalism are evolutionary, we have not yet reached the point where citizens of one state can realistically be expected willingly to submit a bi-state death tax dispute of this magnitude to a jury drawn from citizens of the rival state. Only by transfer to a disinterested forum can the appearance of impartial justice—and its actuality—be attained.

## CONCLUSION

The judgment of the Court of Appeals must be reversed. At a minimum, the decisions to deny joinder of the heirs and, for that reason, to deny transfer to a disinterested forum were in error. *See* Part IV, *supra*. But more fundamentally, the District Court lacks jurisdiction of this action. Jurisdiction is precluded by 28 U.S.C. § 1251(a), because at bottom this is a controversy between two states. *See* Part I, *supra*. Moreover, the jurisdictional requirements of the Federal Interpleader Act simply have not been satisfied; although the Court of Appeals found the requisite two "claimants" who are "citizens" of a state, one is the plaintiff-stakeholder, whose citizenship should not be considered for purposes of 28 U.S.C. § 1335 (*see* Part II(A), *supra*) and the other is the County Treasurer of Los Angeles, who no longer has any interest in the "fund" and must be dismissed. *See* Part II(B), *supra*. The Eleventh Amendment also bars this action. *See* Part III, *supra*.

The Estate will undoubtedly respond that these jurisdictional arguments, however technically compelling, should be rejected because they leave it without a remedy against the possibility of inconsistent state court adjudications of domicile and the imposition of death taxes by both California and Texas. But, of course, that is not the inevitable consequence. California's companion Motion for Leave to File Complaint in *California v. Texas*, No.

88, Orig., asks this Court to exercise its original jurisdiction, as it did in *Texas v. Florida, supra,* to render a single, binding determination of domicile.

We frankly concede, however, that a finding that the District Court lacks jurisdiction does not automatically require the granting of that Motion, even if that holding were based upon the exclusive jurisdiction provisions of Section 1251(a). For, as we have shown (*see* pp. 25-26, *supra*), the Court could theoretically conclude that even though Section 1251(a) precludes the exercise of district court jurisdiction under the Interpleader Act, equitable or prudential considerations—such as those urged by Justice Stewart in his concurring opinion in *California v. Texas, supra*—foreclose the exercise of original jurisdiction at this time.[58]

The Estate may justly respond that, as Professor Chafee wrote, "[s]omewhere within [the] federal system we should be able to find remedies for the frictions" caused by multiple state death tax claims based on inconsistent assertions of domicile. Chafee, *Federal Interpleader Since the Act of 1936,* 49 Yale L.J. 377, 388 (1940), quoted in *California v. Texas, supra,* at 608 n.9 (Stewart, J., concurring). But that surely must be understood as an appeal for a *legislative* solution and not for a judicial rewriting of unambiguous statutes. We have demonstrated that the clarity of the language of Sections 1251(a) and the Interpleader Act is matched by an absence of the slightest indication that Congress intended the Interpleader Act to provide a means of adjudicating rival state death tax claims, or viewed it as an exception to the exclusive jurisdiction given this Court to hear controversies between states. The Estate would have the Court recast what Congress has written to achieve a result which it regards as just; but the Court cannot achieve that result without violence to the intent of Congress and—if that were not enough—without achieving a wholly unsuitable remedy for the resolution of controversies of this nature: an action which ordinarily cannot be brought in or transferred to a disinterested forum. *See* pp. 10-11, *supra.*

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58. We trust that the Court will appreciate the conditional nature of this statement. With all respect, we believe that the analysis of Justice Stewart's arguments against the exercise of original jurisdiction presented in California's Motion for Leave to File—arguments not presented in the 1978 proceeding—convincingly shows that the exercise of original jurisdiction is entirely warranted, and fully in keeping with precedent.

Accordingly, there surely can be no stronger case for the application of the Court's frequent admonition that such matters are for Congress to resolve, even though the results which follow from the present statutory structure are not wholly satisfactory. *See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc.*, — U.S. —, 49 U.S.L.W. 4537, 4542 (1981); *Northwest Airlines, Inc. v. Transportation Workers*, — U.S. —, 49 U.S.L.W. 4383, 4388-89 (1981); *TVA v. Hill*, 437 U.S. 153 (1978). No one will dispute that Congress might wisely craft an exception to the Court's exclusive original jurisdiction so as to provide an alternative forum for adjudicating conflicting state death tax claims. Surely one element of such a statutory scheme would assure that domicile was not determined by laymen from a claimant state. But it is equally plain that Congress has not done so, despite decades of academic criticism of the uncertainties and anomalies traced in Justice Stewart's historical narrative in *California v. Texas, supra*, 437 U.S. at 607-610. That being the case, the Court's observation in *Director, Office of Workers' Compensation Programs v. Rasmussen*, 440 U.S. 29, 47 (1979) is equally applicable here:

"Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' "

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